Case and Comment

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# Sociological Aspects of the Income Tax

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THE speaker of the House is reported to have declared in a recent public address that "the income tax will never be repealed so long as the earth continues to slide down the ecliptic." Without astronomical exaggeration, it is a safe prediction that income taxation will remain a permanent part of our national fiscal policy, just as it has become a fixed and very profitable source of revenue in practically all the civilized countries of the world, even conservative France. But the probable extension of the tax, in the United States, is a subject worthy of very careful consideration by lawyers, economists, and publicists.

On the one hand, other forms of taxation are being abandoned either from policy or of necessity. The receipts from customs duties have been greatly diminished, and although it is possible that the tariff may be raised again, if there is no other way of meeting the public exigency, yet there are very many people who expect and desire that the government's income from this source should dwindle to the vanishing point. The remarkable spread of sentiment in favor of liquor prohibition indicates that the receipts from internal revenue taxes will materially decline; and certain other forms of special taxation which have been proposed meet with such vehement opposition that their enactment into law appears unlikely. On the other hand, provision must be made for the enormously increased appropriations which will be necessary in the coming years. How is the gap to be bridged? It is to be feared that the line of progress will not be determined solely by sound principles of public finance, but by the impingement upon those principles of a totally different set of influences, those sociological influences, namely, which grow out of the advanced and even radical tendencies which now occupy so prominent a place in American political philosophy. Some of the leaders in Congress are declaring that the greater part of the government's new revenue will come from increased levies on inheritances and new corporation taxes, and eventually from increased supertaxes on incomes. It is significant that the Federal income tax, enacted less than four years ago, has already been doubled as

respects the "normal" tax and heavily increased as to the supertax. But the point to be here emphasized is that very few men of prominence in public life seem either to expect or to wish that additional revenue for the government should be obtained by lowering the income-tax exemption, and so bringing within the scope of the tax a much greater class of taxpayers.

According to statistics compiled a few years ago, and which, if they have been changed since the outbreak of the war in Europe, have not been changed in the direction of greater lenity, the amount of annual income exempt from taxation in England is $800; in Prussia, $214; in Sweden, $1,650; in Norway, $270; in Denmark, $540; in Austria, $250. And a consular report states that in the Canton of Berne in Switzerland the rate is 6¾ per cent on all incomes above $120. Under the laws of Virginia, North Carolina, and Hawaii, the exemption is $1,000; in Massachusetts it is $600; in Wisconsin there is an exemption of $1,200 for husband and wife, with an additional allowance of $200 for each minor child. Under the Federal income tax law, the exemption is $3,000 for unmarried persons, and $4,000 for the head of a family. In seventeen states in Europe and Australia the income tax is paid by about 10 per cent of the population; in Saxony, by one out of four; in Prussia, by one out of six; in England (before the war), by one out of thirty-seven. But in the United States, under the Federal law, about one person in three or four hundred pays the income tax. That is to say, the entire burden of the tax is borne by less than ½ of 1 per cent of the people. Note, also, that the new Federal "estate tax" or inheritance tax of 1916 does not fall upon any estate of the value of $50,000 or less.

These differences in the incidence of income taxation are easy to explain. In European countries the income tax is a popular tax in the sense that practically all the people contribute to it, the exemption being placed at the lowest point where the yield of the tax will pay the cost of collecting it. In the United States the income tax is a popular tax in another and a sinister sense. It is popular in the sense of being highly approved by the 99,000,000 people whom it leaves untouched. Of course it was intended that it should fall, as it does, only upon the wealthy and the well-to-do. As to the reason for selecting out this small class of the people, I prefer, instead of advancing my own opinions, to cite the testimony of some publicists and statesmen. "The sovereign state," says one, "has a primordial, intrinsic, underlying right to all property, more valid in the final instance, than the property right vested in the legal owner. The right to tax involves the right to destroy. . . . Even after the wealth has passed into the hands of individuals, it is not beyond the reach of the state. By progressive taxes on property, incomes, or inheritances, the state can do much towards preventing too insensate an accumulation of individual wealth. Theoretically there are no limits to taxation along these lines. The nation might legally make itself sole heir to each of its citizens. . . . We are now going over more completely to a conception of taxation as an instrument for the socialization of production and wealth, as a means of changing the currents and directions of distribution."[1] Another writer tells us that a Federal inheritance tax "would aid in some small degree in reducing the swollen fortunes that have been accumulated and that are in many respects a menace to the nation."[2] Says another: "I cannot conceive of the advent of socialism without a redistribution of wealth through a changed policy in taxation."[3] And again: "Failing other means of control or other means of resumption by the people, there rests, *as yet safe from the courts* [lawyers will do well to note this clause], the power of taxation—the primal right of sovereignty, the beginning of government of every sort, and the last final word in control. The protection of this power and its utilization in the interests of society may yet prove to be the line of least resis-

[1] Weyl, "The New Democracy," pp. 295-297.

[2] De Witt, "The Progressive Movement," p. 178.

[3] R. W. Sellars, "The Next Step in Democracy," p. 118.

tance in abolishing special privileges and restoring equality of industrial opportunity, a task all agree must be accomplished if democracy and the fruits of democracy are not to be crushed under the iron heel of financial oligarchy."[4] In this connection, let us also note the fact that the Corporation Excise Tax Act of 1909 was, on the face of it, imposed solely as a means of raising revenue, but the debates in Congress show that the chief idea in the minds of its advocates was to bring large corporations under the examination and control of the Federal government. And as a further piece of corroborative evidence, and as exhibiting both the tendency and the purpose of the most advanced theories of taxation, consider the following passage from the message of the governor of Arizona to the legislature of that state in 1912: "The tax levy for 1912 contemplates the raising by direct taxation of $380,749 greater revenue than in 1911. It may not be generally known that almost the entire sum of this additional burden was, by the taxing authorities, placed on the industries best able to bear it; namely, the mining companies and the railroads. To be specific, the mining industry contributed $233,124 more than last year, while the railroad companies' taxes were increased by $85,141. Therefore of the total $380,749 additional revenue, $318,266 comes from the state's wealthiest industries, leaving the comparatively insignificant sum of $62,482 to be borne by all other classes of property."

It should not be altogether forgotten that Congress is invested with the power of taxation only "to pay the debts and provide for the common defense and general welfare of the United States." But if a tax is designed to secure the "socialization of wealth," or to break up "swollen fortunes," or save the "fruits of democracy" from the "heel of financial oligarchy," its relation to these specified objects is at least obscure. Undoubtedly, a tax avowedly levied for any of the purposes to which it is now proposed to turn this powerful engine of oppression would be unconstitutional. But the courts will very rarely permit themselves to look behind the ostensible purpose of a statute, and consider the motives which really actuated the legislature. Indeed, as Professor Burgess has said: "Since the adoption of the 16th Amendment, we have no real constitutional government upon that most important of all subjects, the relation of the government to the individual's right to property."[5] In the Constitutions of the states there still linger some restrictions which prevent the frankly predaceous exercise of the taxing power. And no doubt many people, including the advanced political philosophers, would gladly follow the example of the people of Oregon, who, by means of an initiative measure in 1910, amended their Constitution by providing that "none of the restrictions of the Constitution shall apply to measures approved by the people declaring what shall be subject to taxation or exemption or how it shall be taxed or exempted."

If constitutional limitations are removed or disregarded, and taxation is no longer levied upon just and equal principles, but is imposed heavily upon the small minority, it ceases to be a legitimate exaction for defraying the necessary expenses of government, and becomes a club to bruise the head of the rich man. But the new sociology demands not merely the expropriation of large fortunes, but their redistribution among the population, or among certain classes of the population, in the form of governmental benevolences. These range all the way from free concerts in the parks to mothers' pensions and old-age insurance. There is a growing and insistent demand for them, and it is to satisfy this demand that supertaxation of the wealthy is proposed.

But this practice is unjust, bad public economy, undemocratic, and demoralizing.

As to the first point, if John Doe's home is fairly worth $5,000 and is assessed for the general property tax at that sum, and if his neighbor Richard Roe's home is fairly worth $10,000 and is so assessed, it is obviously just that

[4] Hon. William Kent, in an address on "Democracy and Efficiency," at Harvard University, March 29, 1912.

[5] Burgess, "Reconciliation of Government with Liberty," p. 369.

Roe's tax should be exactly twice that of Doe. It is difficult to believe that any person with even a rudimentary sense of fair play would say that he ought to pay three times or four times as much, simply because he is financially able to do so. But do the standards of justice and fair play shift when the incidence of the tax is changed from the home to the income?

To realize the economic folly of the new theories of taxation, we have to take two things into consideration: First, the taxation of incomes and inheritances, like any other form of taxation, may be pushed so far as to become prohibitive. And even short of that point, its excessive use may be highly detrimental to the general welfare. To break up great fortunes into minute fragments, and to discourage the accumulation of wealth, would have the effect of a creeping paralysis in all the major fields of industrial enterprise, manufactures, mining, commerce, and transportation. But the resultant slowing-up of industry would bring disaster upon precisely those whom the new sociology is designed to benefit; namely, the wage earners. The healthy alimentation of the worker is not promoted by handing him his infinitesimal share of some plutocrat's fortune, but by keping him in a steady and well-paid job. As John Stuart Mill said, it is bad economy "to relieve the prodigal at the expense of the prudent. To tax the larger incomes at a higher percentage than the smaller is to lay a tax on industry and economy, to impose a penalty on people for having worked harder and saved more than their neighbors." [6] But in the second place, our Federal income and inheritance taxes not only do this, but they exempt altogether the men of small means. Now, when one steps up to the desk of the collector of internal revenue and pays his income tax in real money, he is very apt to realize the fact that government is not (like the air we breathe) the gift of the Creator, but a human institution, and an extremely costly one. The reaction of his purse to the demand of the tax gatherer gives him a motive for being economical and for desiring to keep the expenses of government at least within reasonable limits. But the enormous majority of our people do not consciously pay any taxes at all to the national government. That is, the Federal taxes to which they contribute are indirect and make no visible dent in the pocketbook. Why, then, should they be concerned about the extravagant cost of government? On the contrary, they are encouraged on all hands to invent new forms of governmental benevolences—more particularly on the part of the state governments but to some degree on the part of the national government also—and to clamor for their enactment. Thus the appalling wastefulness of public administration is on the increase. But the great mass of citizens, being exempt, care nothing for economic facts and tendencies which are, to them, mere abstractions. Why, indeed, should they worry? The rich pay for it all. It was remarked by a philosopher of the last generation that, "where each citizen is offered certain benefits for which he is unconscious of paying, he is tempted to approve of extravagance, and is prompted to take the course, unknowingly if not knowingly dishonest, of obtaining benefits at other men's expense. During the days when extensions of the franchise were in agitation, a maxim perpetually repeated was: 'Taxation without representation is robbery.' Experience has since made it clear that, on the other hand, representation without taxation entails robbery." [7] Yet numerous high executive and legislative officers have complacently described the acts of Congress of 1913 and 1916 as establishing an "equitable" income tax.

I have said that income and inheritance taxes, when administered as at present, are undemocratic. Surely it needs no argument to show that the truly democratic conception of government involves the participation of every citizen not only in the benefits of government, but also in bearing its burdens. Let the exemption from the income tax be

[6] Mill, "Political Economy," bk. 5, chap. 2, § 3.

[7] Herbert Spencer, "Principles of Ethics," vol. 2, p. 199.

dropped to the lowest feasible point, so that every man should contribute his share, though it were but a mite, and we should have a really democratic tax—and a wholesome lesson in political science. Perhaps it would have been more correct to say that the taxational spoliation of the rich is in the direction of a return to the ancient and discredited conception of democracy, in which Demos was subject to no restraints, and the lives, liberty, and property of the few were always at the mercy of the many. Put such an unlimited power of spoliation in the hands of an irresponsible majority, and we shall find ourselves not so very far from legalizing

> "— the good old rule, the ancient plan,
> That they should take who have the power,
> And they should keep who can."

It would be interesting, if space permitted, to draw a parallel between modern supertaxation of incomes and the "liturgiæ" of the ancient Greeks, those forced contributions from the rich for the purpose of supplying the populace with games and feasts. But democracy in "brief but brilliant Greece" led the Athenians "down the road to glory and then to ruin."

From these considerations it follows inevitably that an abuse of the taxing power in this direction must demoralize citizenship. It was well said by a thoughtful writer: "We must remember that every graded tax should, if possible, be collected, if only to a trifling amount, from the lower incomes also. Every citizen should have an interest in the government, and with that interest he should have the sense of responsibility that goes with bearing his share in its cost. The growth of a great mass of voters who had lost their sense of responsibility would be a calamity. The business exploitation and price extortions practised by privileged combines and cliques have tempted us in this direction, but we cannot achieve progress by exempting the poorer vote from all taxation; rather we must bring to both rich and poor alike a keen sense of the matchless service that our government can perform if it is properly supported and financed by all classes, and is in this real sense a government of all the people." [8] But as matters now stand, the income tax affords a most disquieting illustration of what an unrestrained majority can and will do when the safeguards which protect the minority have been stricken down. There is practically no limit to the amount of money which can be raised by such a tax, and there is nothing to prevent its being continually increased. With such a weapon placed in its hands, what political party would hesitate to rely upon it for the chief support of the constantly increasing expenses of the government? It is destined, then, that the income tax and the cognate tax on large inheritances shall eventually replace all other forms of national taxation? If so, we shall witness the unedifying spectacle of a small body of prosperous men and women forced to bear the entire burden of government, while the huge majority exults in the increasingly lavish distribution of governmental aids, gifts, services, and benevolences, to which, however, no member of it contributes anything. Is this what the "rule of the people" shall come to mean? Is this "triumphant democracy?"

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[8] Young, "New American Government," p. 105.

# A Real Advance in State Finance

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SURELY, the student of political science in future decades will find a perplexing problem in tracing the real ebb and flood tides of organic governmental changes amid the eddying currents in our time and generation.

In far-Pacific commonwealths of accepted Republican faith, innovations designed to decentralize government and locate direct political power in the masses of the people have been frequent in recent years, but it remained for Middle Atlantic Maryland, imbued with inherited Jeffersonian Democratic doctrine, to adopt at the recent November election a constitutional amendment which centers in the governor of the state more power than has ever before been vested in an American executive. Not only does the Maryland amendment invade the holy of holies of American political theory — the Montesquieuan plan of separate executive, legislative, and judicial branches of government— by transferring the right to originate appropriation bills from the people's representatives in the legislature, where it was located among English-speaking nations only after centuries of struggle dating from the Magna Charta, to the single-headed executive of the state, but it even lays violent hands on the ark of the covenant in our political faith by giving the governor the right to enter the legislative halls and the legislature the correlative power to hale the governor before its bar.

It was, of course, an extraordinary condition that made such a revolutionary suggestion capable of respectable reception, much less possible adoption, so soon after a similar plan had been repudiated at the polls in New York. Maryland, like other states, had its early era of craze for internal improvements when millions were lavished on paralleling canals and railroads, but through wise statesmanship the consequent financial storms were successfully weathered. For seventy-five years its public men have bothered little about public finance, and its officials have been elected without concern as to their knowledge of or fitness to cope with treasury problems. Through administration after administration, the state has slipped along, occasional overexpenditures being met without great embarrassment. In the spring of 1915 the comptroller of the state suddenly and solemnly announced that the cupboard was bare, and that the appropriations made by the legislature of 1914 for the fiscal years 1915 and 1916 could not be paid. Mr. Harvey S. Chase, an eminent authority on public finance, was employed to examine the state's books, and later reported that Maryland was facing a deficit of $2,000,000, which could be met only by a bond issue. This issue was authorized by the legislature of 1916, and for the first time in its history Maryland paid its current expenses out of the proceeds of state bonds. In the summer following the disclosure of the condition of the treasury, the state convention of the two political parties met, and each pledged itself to the appointment of a Commission to study the financial affairs of the state, and to the enactment of remedial legislation that would prevent a recurrence of the plight. The Democratic party being victorious, the Commission named in its party platform met and undertook the task. This body consisted of President Frank J. Goodnow, of Johns Hopkins University, an authority on administrative law and political science; James Alfred Pearce, an eminent scholar and former member of the court of appeals; Joseph D. Baker, a bank president and man of large business in-

terests; Philip D. Laird, former chairman of the Public Service Commission, and a man of great influence in the state; B. Howell Griswold, Jr., a member of the banking firm of Alexander Brown & Sons, and active in all lines of public work; F. Neale Parke, one of the leaders of the state bar; and the writer, a former member of the state senate and house of delegates.

In investigating the causes of the condition it was disclosed by the Commission that Maryland had greatly broadened its domain of public activities, and that the expenditures for new agencies such as the Workmen's Compensation Commission, the Public Service Commission, the Banking and Insurance Departments, the Public Health and Sanitation Boards, for the promotion of technical, agricultural, and collegiate education, for the cure of consumptives, the care of the insane, and for the conservation of natural resources, had enormously increased, while in the meantime there had been made material reductions and changes in the taxation of banks, trust companies, public service and ordinary business corporations, at the request of affected interests, all done without regard to the result on the state's revenues. It was brought out that some public men had seen the impending trouble and had sought to avert it, but that the people generally had been unaware of the true state of affairs. The state comptroller, an officer charged with the duty of informing the legislature of the condition of the public treasury, estimating the probable revenues and the aggregate of possible appropriations, pointed to his report in which for years his office had warned against extravagance and cautioned economy. The legislature that had made the final overappropriation refused to take the blame, asserting that the comptroller's figures and tables were unintelligible, and that, even if it had overappropriated, the governor should have vetoed or reduced items to bring the total down to the limit fixed by the comptroller. The governor declined to assume the responsibility, urging that the Constitution imposed the duty of appropriating public money on the legislature; and as the objects of the appropriations were nearly all worthy, in approving them he had merely performed his constitutional duty. Thus, the attempt to shift the responsibility stood, each department blaming the other. The Commission found that the members of the Maryland legislature, as in many if not all such bodies the world over, represent the people in the political division from which they are elected, rather than the state as a whole. The home folks judge the record of a member by the share of the state funds that he secures for the institutions in the locality or for the roads in the country. Thus, even the members of broadest vision and highest motives are led to scheme to have a part of the state's money spent in their own communities.

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This unsatisfactory condition is accentuated by the practices of the institutions, departments, and colleges that receive state appropriations. Every hospital, asylum, and institution attempts to enlist the aid of some forceful member in its particular cause, every state-aided college seeks to inspire an alumnus legislator with a zeal and eloquence for his alma mater akin to that of Daniel Webster pleading for Dartmouth, and the chief of each state department has

his county senator or delegates working for that special branch of the administrative government which he honestly believes concerns the very existence of the commonwealth. The entire session is a conscious or unconscious log-rolling, vote-trading struggle for appropriations. The chairmen of the committees that make up the appropriation bills try to keep the grants within bounds, but are powerless against the combinations effected to have included items in which local constituencies are interested. Yet experience proves that the average member is honest. The fault is found in a system which makes the legislature, with its short and busy session, the place, and the legislators, with their want of treasury knowledge and lack of state-wide responsibility, the agencies to formulate a well-balanced financial scheme of revenues and expenditures.

It was found that the unsatisfactory working of the system of legislative budget making is not peculiar to Maryland. New York, Ohio, and California are wrestling with the problem, and almost every state in the Union has taken abortive, because not radical, measures to remedy the evil. Congress has been made aware of the cause of the trouble, and the way out marked by an able Commission appointed by President Taft, but Congress prefers to cling to its flesh pots.

In Maryland various expedients have been tried. At one time money bills could originate only in the more numerous branch of the legislature, but later either house was empowered to begin such measures. This plan failing of the desired result, the membership of the appropriation committees was increased and later the bills distributed among several committees. The power to veto individual items was conferred on the governor by constitutional amendment, and the executive gradually usurped the further prerogative of reducing amounts. The office of state comptroller was created, and the incumbent charged with the duty of estimating probable revenues and possible expenditures, but the resentment of the legislature constrained this official to the mere compilation of a report silently submitted and uniformly ignored. In spite of all these efforts, Maryland last year had a $2,000,000 treasury deficit.

The make-up by Congress of the public buildings and river and harbor bills—the so-called pork bills—has produced wide discontent, but it is only fair to say that such legislation is inseparable from a system which commits the allotment of funds from the general treasury to locally chosen representatives, who to insure re-election must bring about the spending of a portion of the public moneys in their home districts. In 1885, when Mr. Randall was chairman of the committee on appropriations and in opposition to the tariff policy of his party, the money bills were distributed among several committees. This plan resulted in a large increase in the total sum appropriated. Even larger increases followed the change in the house rules incident to the fight against Speaker Cannon. We have seen a billion dollar Congress, but have lived to experience one whose grants aggregated nearly two billions. After a long service amid such conditions, it is not surprising to read of Mr. Fitzgerald, chairman of the house committee on appropriations, hurling at the House his drastic remedy,—"deprive the individual member of Congress of the right to initiate expenditures,"—coupled with this prophecy, "And it will be done some day."

The Goodnow Commission in Maryland did not go to this extreme. It studied the reports of Dr. Lowell, of Harvard, on the workings of the English system, under which the ministry recommend all grants out of the public revenues with a rule, unbroken for two hundred years, that no additions may be made by individual members of Commons. While admiring the operation of the English plan, the Commission made no attempt to ingraft it on the American system of government with its officials elected for a stated term. The expedient of putting the executive veto before instead of after legislative action was adopted, and a plan devised of centering in the governor the responsibility of making up the appropriation bill the

items of which must have legislative sanction before becoming effective.

The Maryland plan, as devised by the Goodnow Commission, was approved by the legislature after a few minor changes, and ratified by the people at the November election of last year. It requires estimates from all departments, agencies, and institutions applying for state money, these estimates to be itemized and to give such information as the governor may direct. Provision is to be made for public hearings attended by state officials and the representatives of institutions. Within twenty days after the legislature meets, and within thirty days in case of an incoming governor, unless the time be extended by the legislature at the same session, the executive must submit two budgets, one for each of the years intervening between the biennial sessions. Each budget must contain a complete plan of proposed expenditures and estimated revenues, and shall show the estimated surplus or deficit of revenues at the end of such year. Accompanying each budget shall be statements showing the revenues and expenditures for the preceding two years, the assets, liabilities, reserves, surplus or deficit of the state, the debts and funds of the state, estimates of the state's financial condition as of the beginning and end of each of the fiscal years covered by the two budgets, and any suggestions the governor may desire to make as to methods for the increase or reduction of the state's revenues. The governor is required to insert in the budget estimates for the executive department, for the legislature as made by the presiding officers of each house, for the judiciary department as provided by law, an estimate to pay and discharge the principal and interest on the state debt, appropriations for salaries of officers, for the public schools, and for such other purposes as are set forth in the Constitution. Bills containing the above regular appropriations and such other special appropriations as the governor may recommend are delivered to the presiding officers and introduced into the two houses. The governor may supplement or amend these bills before final action has been taken on them, but only with the consent of the legislature. The legislature may not amend, so as to affect the obligations of the state, the provisions for the public schools or the payment of the salaries of public officials, but may increase or diminish the items relating to the legislature, may increase but not diminish the appropriation for the judiciary, but otherwise may strike out or reduce any items therein, except that the salary of a public official may not be decreased during his term of office. When passed, the bill does not require the approval of the governor. The legislature is not deprived entirely of the power to appropriate, but it cannot consider any other appropriation until the budget bill has been finally acted upon by both houses. Each appropriation not contained in the budget bill must be passed in a separate bill limited to a single object, the necessary revenue to pay the appropriation to be raised by a direct or indirect tax provided for in the bill. Such supplementary appropriation bill, when passed by a majority of both houses, must be submitted to the governor for his veto or approval, but may be passed over the governor's veto by three fifths of the members elected to each house.

Another important feature of the Maryland budget amendment is the right which it gives to the executive to enter the legislature and in person defend his financial recommendations. Professor Ford, of Princeton, in a recent article argues from historical premises that the framers of the United States Constitution assumed that the "administration would possess the customary initiative existing under the English system." In this connection the author seems to intimate that the clause making it the duty of the President to recommend to Congress "such measures as he shall judge necessary and expedient" was intended to give the President more rights in the legislative body than it has been his wont to exercise. The learned scholar may not have intended to convey this impression; and, if he did, students generally may not concede his conclusions, but nearly all experienced legislators will agree that a return, if we choose so to call it, or an inauguration, if you

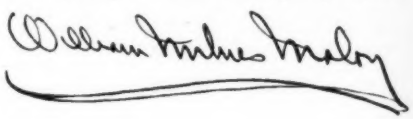
prefer to say it, of the plan of executive admittance into the legislative halls as a matter of right, and at the call of the legislature as a matter of duty, is indispensably necessary for the equable operation of our governmental machinery. More than one governor of Maryland and more than one President of the United States, debarred from the legislative arena even when the stoutest champions of his dearest projects are sore beset, has been compelled to barter offices for progressive financial legislation. It is a stratagem frequently resorted to by wily political leaders to organize a revolt among legislative members against administrative measures until the Executive has come to terms on appointments. The American executive who has arrayed against him the corrupt among the political bosses usually finds the chairmen of committees picked from among his opponents, and is powerless to advance his projects until he makes terms with his enemies. The Maryland plan gives the governor the right to come before the legislature in person, and in the white light of publicity explain his measures and expose the motives of his opponents. In turn the legislature may summon the executive and heads of departments, and publicly elicit information to disclose any covert motives of the administration. This feature will be a tower of strength to an honest executive in contending with the "invisible government," and will be a powerful weapon in the hands of the people's legislative representatives in fighting a tool of the "interests."

The fear that the effect on the legislature will be to reduce such bodies to the present debilitated condition of city councils is groundless. The budget bill presented early in the session will be the object of both partisan and public-spirited examination, criticism, and debate, and will make the law-making branch truly a deliberate body. For membership in such a legislature, the most gifted and best equipped of our citizenship will contend.

It is true that the power may be abused. It is also true that the plan makes the governorship of the state a more important office than it has ever been before. The answer to this is that, if abused, the people can locate the responsibility without fear of mistake, and that greater care will be exercised by the people in choosing the occupant of this high office.

The budget amendment adopted in Maryland is a long step in advance in American governmental procedure, and its working will be watched with much interest by other commonwealths.

It is clear that there is urgent need of an immediate restatement of political party creeds when such a measure as the Maryland budget amendment is passed by a Democratic legislature, in performance of a pledge by a Democratic state convention, indorsed by a Democratic governor, ratified by a Democratic constituency, while opposition to centralization of power in government is a Democratic rubric coeval and synonymous with the party itself.



# The Federal Inheritance Tax Law of 1916

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THE tendency and character of recent Federal legislation is apparently little appreciated by our people, who seem not to be much interested in the fundamental changes now taking place in the authority and activities of the Federal government. The new Federal Inheritance Tax is only one of many innovations, the study of which will be much facilitated by a consideration of recent political history.

The Progressive revolt of 1912 resulted in the election of a Democratic President and placed the Democrats in control of both branches of Congress, standing on a platform of economy. Shortly after Inauguration Day, in June, 1913, the Republican Tariff Law was replaced by the Underwood bill, which proved a failure as a revenue producer, not only before the beginning of the great European War, but especially afterwards. The decreasing revenues were accompanied by increased expenditures in all branches of the government, including extra expenses for the Army and Navy in the "Preparedness" movement, until in the early part of 1916 the Secretary of the Treasury estimated a deficit for the fiscal year 1917 of over $250,000,000.

The Democratic political problem then became one of raising by taxation this huge sum. Finally on July 5, immediately after the great conventions, the ways and means committee reported a new revenue bill, drafted by the Democratic members of the committee. The bill was pushed through both branches of Congress without material amendment, and became a law September 8, 1916.

It covers all sorts of subjects from income and inheritance taxes to taxes on pawnbrokers and pool tables, a Tariff Commission and regulations against unfair competition. The new Revenue Law was expected to yield over $250,000,000, of which the annual income from the inheritance tax was estimated at $54,000,000. It must not be forgotten that the measure was fathered by the Democratic party, the party of states' rights.

It was assailed by the Republicans as a "hodgepodge of ill-considered legislation,"[1] as "a jitney,"[2] as "what we call in the stock-breeding world a 'sport.' That means it belongs nowhere and cannot be classified. Down in Missouri we would call it a Democratic House with a Republican lean to."[3] It was likened to Joseph's coat of many colors.[4] Former Speaker Cannon asked in vain that its provisions might be voted on separately. It was pointed out that the new law overlooked all the congressional acts heretofore passed.[5]

It was openly charged that the bill was drawn for political effect. Congressman Gillette remarked[6] that the whole bill was "framed to touch just as few taxpayers as possible, coming as it does just before election." Mr. Moore, of Pennsylvania, pointed out[7] that the President's suggestion to tax gasolene and automobiles was unwise in view of

[1] Rep. Magee, Cong. Rec. p. 12332.
[2] Cong. Rec. p. 12262.
[3] Cong. Rec. p. 12262.
[4] Cong. Rec. p. 12152.
[5] Rep. Dillon in Cong. Rec. p. 12899.
[6] Cong. Rec. p. 12145.
[7] Cong. Rec. p. 12135.

the fall elections. Hence, "Tax the rich; double the income tax; soak inheritances. Dead people do not vote."

The Democrats replied that this plan involved taxation not one cent of which bears on the farmer or laborer, but on incomes, large inheritances, and munition manufacturers, which can well afford to pay.

The theory of inheritance taxation was well stated by Mr. Crisp as follows:[8] "When we came into this world we brought nothing, and it is equally true that when we go out we carry nothing with us. Thus, but for society, when a man dies his earthly possessions belong to those who have the might and power to take them. As men progressed in civilization they devised systems of law and provided rules of inheritance whereby their children and loved ones can remain in lawful possession of the property they die seised and possessed of, but this is a civil right conferred by government, and is not a natural right. But for government this would not be true, and it is nothing but right and equitable that the government which permits the property a man dies possessed of going to his descendants should receive a part of the inheritance, for the government must be supported to insure this privilege."

There was surprisingly little debate on the inheritance tax sections, and practically none on the details of the law and the new principles involved in it. The debates were concerned almost entirely with the Democratic record of "misrule and extravagance," on the one hand, and what the Democratic party had accomplished for the people, on the other. The superiority of the tariff as a source of revenue seems to have been one of the main subjects controverted. When the bill reached the Senate, the debate became desultory, and covered everything from the use of public lands to the Mexican situation and the eating of horse meat in New York.

Senator Weeks, however, in a sensible speech, remarked:[9] "There is no objection to an inheritance tax, but there is vital objection to doubling and tripling taxes on such sources of revenue. Income and inheritance taxes are two of the sources of revenue which should either be collected by the state and a percentage turned over to the national government, or better, should not be imposed at all by the national government in time of peace." He pointed out that under the act the wealth of Massachusetts pays six times as much per dollar of wealth as Alabama. To the objection that this was double taxation, the Democrats replied that the states only collected $28,000,000 annually through inheritance taxation, and that this act was only aimed at great estates, leaving smaller estates for state taxation.

Reverting now to the words of the act itself, we find the sort of result which might be expected from the methods of its enactment.

Its outstanding feature is that it is imposed on the estate itself, instead of on the shares of each beneficiary, and at a progressive rate. This was exactly the sort of tax which Congress attempted to impose in 1898, but which the Supreme Court construed as applying to each distributive share, giving as one of its reasons the gross injustice of the other view. The court remarks:[10]

"The gross inequalities which must inevitably result from the admission of this theory are readily illustrated. Thus a person dying, and leaving an estate of $10,500, bequeathes to a hospital $10,000. The rate of tax would be 5 per cent and the amount of tax $500. Another person dies at the same time, leaves an estate of $1,000,000, and bequeathes $10,000 to the same institution. The rate of tax would be 12½ per cent and the amount of the tax $1,250. It would thus come to pass that the same person, occupying the same relation and taking in the same character two equal sums from two different persons, would pay in the one case more than twice the tax that he would in the other."

The act of 1898 was sufficiently ambiguous in its terms to enable the court to avoid by construction this result. There is no possible ambiguity in this

[8] Cong. Rec. p. 12110.
[9] Cong. Rec. p. 15513.

[10] Knowlton v. Moore, 178 U. S. 41, 76, 44 L. ed. 969, 983, 20 Sup. Ct. Rep. 747.

respect in the act of 1916. It is clearly and unmistakably a tax with progressive rates based on the size of the estate alone. The Supreme Court will be forced to decide squarely the validity of such a method, and judging by its past utterances the result would seem extremely doubtful.

It should be borne in mind that it is commonly supposed that inheritance taxes are laid on the right to receive rather than on the right to transmit,[11] that there is already sufficient authority in this country that a progressive rate dependent on the size of the estate is void,[12] and that the provisions of the Federal Constitution are no weaker than those of the state Constitutions on which these decisions in the state courts are based. On the other hand, the court may take the view that Congress may, if it pleases, levy a tax on the right to transmit rather than on the right to receive, and that the matter of injustice and inequality is a legislative rather than a judicial question.

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The rates levied on the estates of residents are as follows:

Not exceeding $50,000, exempt; $50,000–$150,000, 2 per cent; $150,000–$250,000, 3 per cent; $250,000–$450,000, 4 per cent; $450,000–$1,000,000, 5 per cent; $1,000,000–$2,000,000, 6 per cent; $2,000,000–$3,000,000, 7 per cent; $3,000,000–$4,000,000, 8 per cent; $4,000,000–$5,000,000, 9 per cent; exceeding $5,000,000, 10 per cent.

As this is written, it is reported that the House of Representatives has passed a new revenue bill increasing inheritance taxes 50 per cent.

Another curious feature of the law is that it seems to bear only on the residue, and does not affect pecuniary legacies or specific bequests and devises. Hence, if a testator worth $100,000 leaves a large portion of his estate in pecuniary legacies to charitable institutions, his wife and children must pay the whole tax out of their share in residue. As probably nine wills out of ten leave the residue to the wife and children of the testator, this new law seems to reach the quite novel result of taxing lineals and exempting strangers. This result would seem to follow from the whole frame of the law, imposing a tax on "the transfer of the net estate," and on the further provision that "the tax shall be paid out of the estate before its distribution." This would seem to be another glaring injustice in the law. The law contains no provision for apportioning the tax among the beneficiaries.

The estates of aliens are also taxed so far as they own property in this country. It seems unlikely that this provision was enacted as an intentional violation of various treaties of the United States.[13] There seems no question today of the validity of such a tax,[14] although it was formerly doubted.[15] Nonresident estates are entitled to no exemptions, property in this country not exceeding $50,000 being taxed at 1 per cent.

[11] Blakemore & B. Inheritance Taxes, p. 7.
[12] Blakemore & B. Inheritance Taxes, p. 62.
[13] See Blakemore & B. Inheritance Taxes, p. 49.
[14] Eidman v. Martinez, 184 U. S. 578, 46 L. ed. 697, 22 Sup. Ct. Rep. 515.
[15] Frederickson v. Louisiana, 23 How. 445, 16 L. ed. 577.

The machinery for collection of the tax is also novel. The executor or administrator is bound within thirty days of his appointment, or of receiving any property of the estate, "whichever event first occurs," to give written notice thereof to the collector. Returns must be made in all estates subject to the tax or where the gross estate exceeds $60,000, and the law imposes a lien for ten years on all taxable estates. The tax is due one year after the testator's death, with interest at 10 per cent if not paid within ninety days of that date unless the collector finds that the tax cannot be determined in that time, when interest shall be at the rate of 6 per cent. The collector is bound, if the tax is not paid within sixty days after it is due "unless there is reasonable cause for further delay," to commence proceedings in the Federal courts to sell the property to pay the tax.

The provisions as to transfers made "in contemplation of death" also seem likely to cause trouble. The law provides that any transfer made by a decedent within two years before his death without a "fair consideration in money or money's worth" shall be deemed to be made in contemplation of death. How will this work out? Most deeds of real estate in this country recite only a nominal consideration. The law seems to place on the executor the burden of proving that any transfer made within two years of death is not fraudulent and subjects that property to a lien. How can a cautious conveyancer accept any deed especially from a wealthy man without requiring evidence of record that the transaction is made for "a fair consideration?" Suppose a wealthy man becomes involved in stock-market operations and, to produce ready money to save himself, sells real estate for half its value? How can he possibly give a good title? Must he give the purchaser a bond of assurance that the seller will live two years or that his estate will pay the tax? How can the buyer be assured that the seller is not worth $50,000, or will not be within two years, no matter how indigent he may appear?

One of the curious features of the situation is that a somewhat careful examination of the Congressional Record fails to disclose that the law was attacked or discussed along the lines indicated above, so far as the inheritance tax feature of the revenue bill was discussed at all.

Another objection made to the law is that it is a direct tax on the property of the estate, and should therefore be apportioned among the several states.[16] The language of the act is that the tax is imposed on the "transfer" and is fixed by the value of the net estate. It should be noted, however, that this tax certainly comes nearer being a direct property tax than any other yet passed in this country.[17] The official returns required of executors ask only for a detailed property statement like any direct tax return.

Is there not a more fundamental objection to the new tax? Is it wise to seek to place on the rich *all* the burdens of government? In the present grave international situation, when it is doubted whether we are one united people, does it not tend towards patriotism to make all feel that they are doing their share, that they are interested in the spending of the national funds, and that they all are necessary and component parts of our system of government? The new act does not do this, but tends towards socialism, and is evidently only the beginning of a new era in taxation.

Arthur H. Blakemore.

[16] Rep. Dillon in Cong. Rec. p. 12899.

[17] As to what is a direct tax on inheritances, see Cotton v. Rex [1914] A. C. 176, 83 L. J. P. C. N. S. 105, 110 L. T. N. S. 276, 30 Times L. R. 71.

# *Public Regulation v. Public Operation: Some Legal Aspects*

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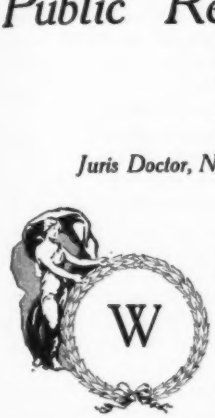

HEN I was a youngster, and things gastronomic went wrong, my mother would approach me with the dreaded cure in one hand, and a bright silver dollar in the other. If I took the one, I could have the other. Sometimes I yielded; and I would go to bed with mingled feelings of internal distress and external pride of possession. But always, when I woke the morning after, I had lost both dollar and distress."

This reminiscence was bestowed upon me by a railroad official, who was complaining that government regulation was converting private ownership into a meaningless phantom of possession. "Now the government," he added, "is doing with the railroads what my mother used to do with me, but with this difference,—it is relieving us of the dollar, but not of the distress. We are losing the benefits of ownership, but not its responsibilities. You own a house. You can sell it for what you will, provided you can get the price you ask. Not so with us. The revenue-producing function has been taken from us. Our rate schedules must be finally determined by the Interstate Commerce Commission and a dozen state commissions. Do we want new capital? Public regulation determines whether or not we have a right to get it. Not only our revenues, but also our expenses, are determined by forces beyond our control. Expenditures for new construction, equipment, etc., are subject to governmental check. Even wages are subject to conditions beyond our control. Workers form a monopoly of labor. Can we fight the monopoly? No. Does the government seek to curb it? No. It re-enforces the monopoly's demands by a legal sanction.

"What, then, is left to us? Nothing. Nothing but the distress; nothing but the responsibilities. The stockholders hold us responsible for return on their investment. The government holds us responsible, the public holds us responsible, writers, lecturers, and editors hold us responsible, not only for the sins of a bygone railroad generation, but for every shortcoming which flows from inadequate plant and inadequate funds for maintenance and extension of service.

"What is this but a system of government operation without governmental responsibility?"

This is a typical point of view, and one which is gaining ground. A growing number, not only of business men, but of public officials, are coming to regard government regulation as merely a modified or intermediate form of government operation.

It is a view, to my mind, which is seriously mistaken. It represents, I believe, a superficial examination of the underlying principles upon which our system of public regulation is based. I think it can be clearly shown that in economic theory, legal origin, and application to modern conditions, government regulation, where properly applied, is entirely distinct from government operation.

What is "public regulation," as we understand it to-day, and where does it come from?

This question naturally gives rise to another: What is "property," and where does it come from?

Without elaborating upon the differ-

ent theories of property, and the speculations as to whether it existed as a "natural" right *prior to* government, or was brought into existence by government itself, it is enough for all practical purposes to say that individuals hold property, under our form of government, as a right of which they cannot be deprived without "due process of law," and without "just compensation." This is specifically guaranteed by the Constitution.

But what does the right of property or ownership mean? Is it simply "exclusive dominion over things"—as textbook writers on law define it? Is it absolute in form? Is it fixed in quantity? Is it without limitation?

I own a house. May I burn it down to the ground? I own an automobile. May I use it without a license? I run a public conveyance. May I charge what I please for carrying passengers?

By no means. For while the right of property is recognized and guaranteed by the fundamental law of the land, it is recognized and guaranteed with this condition,—that it shall not be so exercised as to conflict with the public welfare.

If its exercise is completely opposed to the public welfare, it may be completely abolished; for example, a lottery enterprise.

If its exercise is partially opposed to public welfare, that is, if public welfare requires that it be modified in its exercise, it may be so modified; for example, tenement-house construction.

If its exercise for private benefit conflicts with a more imperative need that it be devoted to public use, it may be "condemned" and devoted to public use, in which case, compensation must be made to the owner for the deprivation of his legitimate right; for example, private land necessary for a public highway.

This dominant right of the public to mold the property right into conformity with the public weal has come to be more or less broadly defined by the courts as "the police power of the state." It has existed since the earliest days of the English common law. It has not changed since. What *has* changed, is the nature of public welfare requirements.

The doubt and dispute on this subject, the voluminous reports of court decisions which crowd the shelves of our law libraries, have grown not out of the question as to whether such a right in the public *exists,* but as to whether this right has been *evoked by a set of facts;* whether, in other words, a condition has or has not arisen touching the public welfare sufficient to justify the exercise of the "police power."

Go back, for example, to the Middle Ages, to the period between the sixth and fifteenth centuries. There were no regulatory commissions in those days. But there was the common law, administered by the courts. And there was the clearly defined principle that whenever, in the conduct of trade, the public was taken at a disadvantage, such disadvantage might be rectified by remedial adjudication or legislation. It was recognized then, as it is to-day, that certain enterprises are "affected with a public interest," and this was not only recognized by the courts, but treated specifically by legislation and crystallized into statute.

In those days, the country was sparsely settled and traveling precarious. Innkeepers were therefore charged with the public duty of housing all who applied for shelter.[1] The ferryman was often the only connecting link between the shores of the stream across which the only highway led. The ferryman was therefore charged with the duty of carrying all passengers, and carrying them safely.[2] The smith was often the only smith for 50 miles around, and the traveler's safety depended upon the shoeing of his horse. The smith was therefore charged with the duty of attending to

[1] "If I come to an innkeeper to lodge with him and he will not lodge me, I shall have on my case an action of trespass against him." Y. B. 39, Hen. VI. 18, pl. 24. Case decided in 1460.

[2] In the year 1348 a suit was brought against a ferryman who overloaded his boat and drowned the plaintiff's mare, the charge being that he failed in his undertaking to carry for all safely. Y. B. 22 Lib. Assis. 94, pl. 41.

the needs of all who applied.[3] The butcher, the baker, etc., were placed in a similar position,[4] and the English Parliament passed enactments fixing the price of foods, wool, and labor.[5] Even as late as the colonization of America, we find that the colonial assemblies enacted statutes fixing the price of bread, wheat, and other staples.[6]

This exercise of public authority, applied to economic conditions peculiar to that day, was simply a manifestation of what the courts today define as the "police power." It was public regulation, pure and simple. But these economic conditions calling for public regulation did not remain fixed. Little by little, in the course of several centuries following the Middle Ages, new economic conditions arose. Competitive units multiplied. The element of scarcity in many callings vanished, so that the public was no longer taken at a disadvantage. Such services were no longer "affected with a public interest." New commercial developments ushered in a *régime* of free competition; and in place of regulation by statutory or common law, regulation by economic law—the law of free competition—came to be more and more relied upon for the protection of the public. This was the period when the *laissez faire* school of economists reigned supreme.

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Then came the "industrial revolution," the spinning jenny, the loom, the application of steam to industry and transportation, and, finally, the complete transformation of our business and social structure by the use of electricity in the field of production and distribution, and in the communication of intelligence by telegraph and telephone.

Law lagged behind economic conditions—as usual, and as was only natural. Free competition was fully relied upon to protect the interests of the public. Capital was not only given the benefit of the *laissez faire*, or "let-alone" policy, but was zealously encouraged by governmental inducements of one sort or another. It took the public some time to appreciate the futility of applying the formula of free competition to this new set of enterprises, now universally known as "public utilities." Many of us are still loath to recognize it,—to acknowledge that the fullest utilization of these services implies a condition utterly at variance with a scheme of isolated units competing with one another. It was only when the anomalies came to the surface in the shape of those abuses which have now passed into muckraking history—rebating, discriminating, defrauding the state, wildcat financing, unwise building, etc.,—that the public became fully awake to the need

[3] In a case decided in the year 1450 we find this statement: "That it was agreed by all the court that where a smith declines to shoe my horse . . . I shall have an action on the case, notwithstanding no act was done, for it does not sound in agreement." Keilw. 50, pl. 4, 72 Eng. Reprint, 208.

[4] "If I come to a victualer to buy victual, and he will not sell, I shall have an action of trespass on my case against him." (Case cited supra, Y. B. 39.)

[5] 51 Hen. 3 Stat. 1; 23 Edw. 3, chap. 1.

[6] Mass. Colon. Laws 1672, p. 120.

of substituting specific governmental action for reliance upon automatic regulation by free competition.

And so the old principle of the "police power" was again brought into active operation. It had never lapsed. It was the same principle, applied to new conditions. Only these new conditions are far more intricate than those to which the "police power" of the early common law was applied. And hence, instead of the simple application of court decisions and statutes, we have substituted an elaborate and scientific system of regulation by experts as an auxiliary to our legislative and judicial framework,—the system which we know as "commission regulation." This system has by no means reached its consummation. We are still feeling our way; and, if we are patient, there is every reason to expect that it will fulfil the purpose for which it was created.

It will be seen, therefore, that the system of public regulation in existence to-day is simply the application of an old principle to new conditions. If it *be* an "intermediate form of governmental operation," then it has been a long time in the process of intermediation. If it be but a "modified form of governmental operation," then we have had governmental operation in modified form for more than a dozen centuries.

That it is in no sense a modified form of governmental operation, a moment of reflection should make clear.

*Operation* is the exercise of a *property* function; *regulation*, that of a *social* function. Operation looks to the *use* of the property right; regulation to the prevention of its *abuse*. Operation seeks to promote the public welfare by direct exercise of the property right. Regulation seeks to promote the public welfare, not by the *exercise* of the property right, but by declaring the rules under which it may be exercised. The distinction is between playing the game, and umpiring it.

But this, it has been urged, is a purely theoretical distinction. Of what practical value is a property right stripped of its beneficial exercise? The answer is, public regulation, *properly exercised*, never does strip the property right of its beneficial exercise.

It *is* true that in direct proportion as the exercise of a property right has created points of contact between private and public rights, the public has erected safeguards to protect the public interest; never, however, penetrating beyond the surface points of contact and invading the property right itself.

To a certain extent, of course, every exercise of a property right—unless one lives apart from society—is "affected with a public interest," the only question being, How public is that interest? And at whatever point the public interest is so affected, we find a legal safeguard.

I may own a square foot of land in the most desolate part of the country. One would hardly say it is "affected with a public interest." Yet society says it is of sufficient concern to the community as a whole that such property shall not be withdrawn from the channels of economic intercourse for too long a period. Hence the rule against perpetuities, in most of our states, forbidding the suspension of alienation for a period longer than two lives in being. And it was not until the middle of the sixteenth century that property in land could be exercised so as to effect a disposition by the owner upon his death.

With certain services, such as the so-called "public utilities," the extent to which they are "affected with a public interest," the multiplication in points of contact between public welfare and the exercise of the property right, has necessitated a corresponding number of restrictions upon the free exercise of such a right. Hence it is that in forty-two of our states we have permanent bodies created by law to supervise the operations of public utilities from the standpoint of rates, facilities, and service; nineteen of these states also exercising a supervision over the issuance of corporate securities.

But never may regulation amount to *deprivation*. It may *affect*, but it may not *displace*, the property right.

The general proposition has been broadly stated by Mr. Justice Brewer, in the case of Interstate Commerce Commission v. Chicago G. W. R. Co. 209 U. S. 108, 52 L. ed. 705, 28 Sup. Ct. Rep. 493:

"It must be remembered that railroads are the private property of their owners; that while from the public character of the work in which they are engaged the public has the power to prescribe rules for securing faithful and efficient service and equality between shippers and communities, yet in no proper sense is the public a general manager."

Take, for example, a typical point of contact between public and public utility calling for the exercise of the police power and justifying the exercise of regulation,—the fixing of rates. If the utility is to charge for its service all that the traffic will bear, the public will be taken at a disadvantage. Regulation steps in to protect the public at this point of disadvantage. The utility may charge only a *reasonable* rate; that is, a rate which will produce only a *reasonable* return on the investment. The courts, in the exercise of judicial review, determine what a reasonable return shall be. The regulatory commissions, in the exercise of technical, administrative review, determine, in a given instance, whether or not this standard has been exceeded. A more than reasonable return impinges on the public welfare; hence the managers, in the exercise of the property right, may not enforce it. A less than reasonable return impinges on the property right; hence regulation, in the exercise of the police power, may not enforce it. And while operation, in the exercise of the property right, *frames* the rates, on the basis of internal study and administration, regulation, in the exercise of the police power, *reviews* the rates, on the basis of external study and administration.

The points of contact between public and public utility demanding the exercise of public regulation may multiply indefinitely without disturbing the property right or usurping the function of operation. It is therefore a mistake to suppose that each new regulatory power with which a commission is invested constitutes a closer approach to operation. The initiative of business management, the problems of business organization, the exercise of business discretion,—the constructive phases of financing, staffing, and traffic development,—are all of the very essence of operation; and these, regulation properly applied never undertakes, and never should undertake, however abundant the regulatory powers.

I say, "properly applied," because it is unquestionably true that in some cases mistaken and unnecessary authority has been granted to regulatory bodies, to the detriment not only of the public utility, but of the public itself in consequence.

But fundamentally, there is just as much distinction between operation and regulation, as between participating in a contest and judging it. And this is true whether discretionary authority be exercised at a thousand stages of the game, or simply one.

Suppose, for example, a public utility company desiring to develop traffic at point A establishes some special facility (not a necessity) at that point. Can regulation force the company to establish a similar facility at all points served by the company? By no means. That is a matter of business judgment, entirely within the scope of the manager's judgment:

"The company is entitled to the privilege of managing its business in its own way so long as it does not injuriously affect the health, comfort, safety, and convenience of the public. The right of the state to regulate public carriers in the interest of the public is very great. But that great power does not warrant an unreasonable interference with the right of management or the taking of the carrier's property without compensation." Chicago, M. & St. P. R. Co. v. Wisconsin, 238 U. S. 491, 59 L. ed. 1423, P.U.R.1915D, 706, 35 Sup. Ct. Rep. 869, L.R.A.1916A, 1133.

So, in the matter of financing a public utility enterprise, while the issuance of new securities is subject to public control in so far as public interests are affected (*i. e.*, for proper use, for purposes necessary to the efficient and economical discharge of the service in so far as the public is concerned by virtue of rates and service), such control cannot be stretched so as to question the exercise of business discretion. The discretion of a commission

". . . cannot override the discretion of the officers of a corporation in the management of its affairs. . . . Its duty . . . is to determine whether a proposed issue of bonds is necessary for the proper purposes of the company, is authorized by law, and is to be used in a proper manner. If such are the facts, it cannot withhold its certificate; other-

wise it cannot grant it." People ex rel. Binghamton Light, Heat & P. Co. v. Stevens, 203 N. Y. 7, 96 N. E. 114.

Similarly, in Bacon v. Boston & M. R. Co. 83 Vt. 421, 76 Atl. 128, the court said:

"To demand of railroad companies the surrender of the right to manage and administer their affairs would be to demand a surrender of the beneficial use of their property and franchises. Our statute in a large and effective sense gives to the Commissioners the right of regulation and supervision of the management by railroad companies of the quasi public business in which they are engaged; but regulation, on the one part, and management, on the other, work together in a salutary way to subserve the public welfare. Without proper regulation, the interests of the public at large have been and will be lost sight of. With regulation obtruding itself into the place of management, capital will recede from the channels of public service, and the industries most useful to the people at large will dwindle; for the incentives to the development, extension, and skilful operation of these branches of business which can be said to be *'affected with a public interest'* will, in great measure, be removed."

The whole principle of regulation is founded on the fundamental consideration of *the public good*. In so far as it promotes *the public good* it is tenable; otherwise, not. It is only as an instrument for promoting *the public good* that it is valid and effective. The primary consideration, therefore, is *the public good*. But it is just as important to *the public good* that, within limits, the right of property be freely exercised, as that it should not be abused. Prevention, by regulation, of the *abuse* of property, is merely a negative way of stating that the public good requires the most effective *use* of private property:

"If it is reasonable that a person or a corporation have liberty to take a certain course with his or its property, it is also for the public good. It is the essence of free government that liberty be not restricted save for sound reason. Stated conversely: It is not for the public good that public utilities be unreasonably restrained of liberty of action, or unreasonably denied the rights as corporations which are given to corporations not engaged in the public service." Grafton County Electric Light & P. Co. v. State, 77 N. H. 539, P.U.R.1915C, 1064, 94 Atl. 193.

Enough has been said, perhaps, to demonstrate that however much the government, in its exercise of the regulatory function, appears to approach governmental operation, it can never, when properly applied, actually do so. The gap between governmental regulation and governmental operation is a real one; and whenever the government undertakes to discharge a commercial function, it does so in a capacity totally different from that wherein it assumes the rôle of regulator. Regulation may proceed indefinitely without encroaching upon operation.

This is not to say, however, that regulation should proceed indefinitely. A needless multiplication of regulatory powers may constrain the owners of an enterprise to surrender ownership and quit the field,—upon just compensation, of course,—just as a community may drive out its citizens by a needlessly burdensome tax rate. In other words, needless regulation, while it cannot destroy the property right, may, by its weight, destroy the element of *initiative* which, properly directed, is capable of making the exercise of property rights most fruitful to mankind.

The effort of regulation, therefore, should be to *direct* the current of human endeavor, but not to *thwart* it.

C. Bunch Shaver.

*Photo by Boston Photo News Co.*

SENATOR BEVERIDGE DICTATING IN THE WOODS AT HIS SUMMER HOME, DUBLIN, N. H., PORTIONS OF "THE LIFE OF JOHN MARSHALL"

# *John Marshall*

## *The Man and the Lawyer*

### *BY HON. ALBERT J. BEVERIDGE*

[Ed. Note.—A youthful admiration for the nationalistic policies of Chief Justice Marshall, conceived by Senator Beveridge when he was a struggling law student in Indianapolis, led to his resolution to undertake a history of Marshall's life, the first two volumes of which appeared a few weeks ago. A notice of these volumes may be found in the New Books department of this issue. The following extracts are reprinted by permission from this notable work, which is copyrighted 1916 by Albert J. Beveridge.]

ON a pleasant summer morning when the cherries were ripe, a tall, ungainly man in early middle life sauntered along a Richmond street. His long legs were encased in knee breeches, stockings, and shoes of the period; and about his gaunt, bony frame hung a roundabout, or short linen jacket. Plainly, he had paid little attention to his attire. He was bareheaded and his unkempt hair was tied behind in a queue. He carried his hat under his arm, and it was full of cherries which the owner was eating as he sauntered idly along.[1] Mr. Epps's hotel (The Eagle) faced the street along which this negligently appareled person was making his leisurely way. He greeted the landlord as he approached, cracked a joke in passing, and rambled on in his unhurried walk.

At the inn was an old gentleman from the country who had come to Richmond where a lawsuit, to which he was a

[1] Southern Literary Messenger, 1836, ii. 181-91; also see Howe, 266.

party, was to be tried. The venerable litigant had a hundred dollars to pay to the lawyer who should conduct the case, —a very large fee for those days. Who is the best lawyer in Richmond? asked he of his host. "The man who just passed us, John Marshall by name," said the tavern keeper. But the countryman would have none of Marshall. His appearance did not fill the old man's idea of a practitioner before the courts. He wanted, for his hundred dollars, a lawyer who looked like a lawyer. He would go to the court room itself and there ask for further recommendation. But again he was told by the clerk of the court to retain Marshall, who, meanwhile, had ambled into the court room.

But no. This searcher for a legal champion would use his own judgment. Soon a venerable, dignified person, solemn of face, with black coat and powdered wig, entered the room. At once the planter retained him. The client remained in the court room, it appears, to listen to the lawyers in the other cases that were ahead of his own. Thus he heard the pompous advocate whom he had chosen; and then, in astonishment, listened to Marshall.

The attorney of impressive appearance turned out to be so inferior to the eccentric-looking advocate that the planter went to Marshall, frankly told him the circumstances, and apologized. Explaining that he had but $5 left, the troubled old farmer asked Marshall whether he would conduct his case for that amount. With a kindly jest about the power of a black coat and powdered wig, Marshall good-naturedly accepted.[2]

This not too highly colored story is justified by all reports of Marshall that have come down to us. It is some such picture that we must keep before us as we follow this astonishing man in the henceforth easy and giant, albeit accidental, strides of his great career. John Marshall, after he had become the leading lawyer of Virginia, and, indeed, throughout his life, was the simple, unaffected man whom the tale describes. Perhaps consciousness of his own strength contributed to his disregard of personal appearance and contempt for studied manners. For Marshall knew that he carried heavier guns than other men. "No one," says Story, who knew him long and intimately, "ever possessed a more entire sense of his own extraordinary talents . . . than he."[3]

Marshall's most careful contemporary observer, William Wirt, tells us that Marshall was, "in his person, tall, meager, emaciated; his muscles relaxed and his joints so loosely connected, as not only to disqualify him, apparently, for any vigorous exertion of body, but to destroy everything like elegance and harmony in his air and movements.

"Indeed, in his whole appearance, and demeanour; dress, attitudes, gesture; sitting, standing, or walking; he is as far removed from the idolized graces of Lord Chesterfield, as any other gentleman on earth.

"To continue the portrait; his head and face are small in proportion to his height; his complexion swarthy; the muscles of his face being relaxed; . . . his countenance has a faithful expression of great good humour and hilarity; while his black eyes—that unerring index—possess an irradiating spirit which proclaims the imperial powers of the mind that sits enthroned within. . . .

"His voice is dry, and hard; his attitude, in his most effective orations, often extremely awkward; as it was not unusual for him to stand with his left foot in advance, while all his gestures proceeded from his right arm, and consisted merely in a vehement, perpendicular swing of it from about the elevation of his head to the bar, behind which he was accustomed to stand."[4]

From 1790 until his election to Congress, nine years later, Marshall argued one hundred and thirteen cases decided by the court of appeals of Virginia.

[2] Southern Literary Messenger, ii. 181–91; also Howe, 266. Apparently the older lawyer had been paid the $100, for prepayment was customary in Virginia at the time. (See La Rochefoucauld, iii. 76.) This tale, fairly well authenticated, is so characteristic of Marshall that it is important. It visualizes the man as he really was. (See Jefferson's reference, in his letter to Madison, to Marshall's "lax, lounging manners.")

[3] Story, in Dillon, iii. 363.

[4] Wirt, The British Spy, 110–112.

Notwithstanding his almost continuous political activity, he appeared, during this time, in practically every important cause heard and determined by the supreme tribunal of the state. Whenever there was more than one attorney for the client who retained Marshall, the latter almost invariably was reserved to make the closing argument. His absorptive mind took in everything said or suggested by counsel who preceded him; and his logic easily marshaled the strongest arguments to support his position, and crushed or threw aside as unimportant those advanced against him.

Marshall preferred to close rather than open an argument. He wished to hear all that other counsel might have to say before he spoke himself; for, as has appeared, he was but slightly equipped with legal learning, and he informed himself from the knowledge displayed by his adversaries. Even after he had become Chief Justice of the Supreme Court of the United States, and throughout his long and epochal occupancy of that high place, Marshall showed this same peculiarity which was so prominent in his practice at the bar.

Every contemporary student of Marshall's method and equipment notes the meagerness of his learning in the law. "Everyone has heard of the gigantick abilities of John Marshall; as a most able and profound reasoner he deserves all the praise which has been lavished upon him," writes Francis Walker Gilmer, in his keen and brilliant contemporary analysis of Marshall. "His mind is not very richly stored with knowledge," he continues, "but it is so creative, so well organized by nature, or disciplined by early education, and constant habits of systematick thinking, that he embraces every subject with the clearness and facility of one prepared by previous study to comprehend and explain it." [5]

Gustavus Schmidt, who was a competent critic of legal attainments, and whose study of Marshall as a lawyer was painstaking and thorough, bears witness to Marshall's scanty acquirements. "Mr. Marshall," says Schmidt, "can hardly be regarded as a learned lawyer. . . . His acquaintance with the Roman jurisprudence as well as with the laws of foreign countries was not very extensive. He was what is called a common-law lawyer in the best and noblest acceptation of that term."

Mr. Schmidt attempts to excuse Marshall's want of those legal weapons which knowledge of the books supplies.

"He was educated for the bar," writes Schmidt, "at a period when digests, abridgments and all the numerous facilities, which now smooth the path of the law student were almost unknown and when you often sought in vain in the Reporters which usually wore the imposing form of folios, even for an index of the decisions and when marginal notes of the points determined in a case was a luxury not to be either looked for or expected.

"At this period when the principles of the Common Law had to be studied in the black-letter pages of Coke upon Littleton, a work equally remarkable for quaintness of expression, profundity of research and the absence of all method in the arrangements of its very valuable materials; when the rules of pleading had to be looked for in Chief Justice Saunders's Reports, while the doctrinal parts of the jurisprudence, based almost exclusively on the precedents had to be sought after in the reports of Dyer, Plowden, Coke, Popham . . . it was . . . no easy task to become an able lawyer and it required no common share of industry and perseverance to amass sufficient knowledge of the law to make even a decent appearance in the forum." [6]

It would not be strange, therefore, if Marshall did cite very few authorities in the scores of cases argued by him. But it seems certain that he would not have relied upon the "learning of the law" in any event; for at a later period, when precedents were more abundant and accessible, he still ignored them. Even in these early years other counsel exhibited the results of much research; but not so Marshall. In most of his arguments, as reported in volumes 1, 2, and 4 of Call's Virginia Reports, and in volumes 1 and

[5] Gilmer, 23, 24.

[6] Gustavus Schmidt, in Louisiana Law Journal (1841), 81, 82.

2 of Washington's Virginia Reports, he depended on no authority whatever. Frequently when the arguments of his associates and of opposing counsel show that they had explored the whole field of legal learning on the subject in hand, Marshall referred to no precedent.[7] The strongest feature of his argument was his statement of the case.

The multitude of cases which Marshall argued before the general court of appeals and before the high court of chancery at Richmond covered every possible subject of litigation at that time. He lost almost as frequently as he won. Out of one hundred and twenty-one cases reported, Marshall was on the winning side sixty-two times and on the losing side fifty times. In two cases he was partly successful and partly unsuccessful, and in seven it is impossible to tell from the reports what the outcome was.

Once Marshall appeared for clients whose cause was so weak that the court decided against him on his own argument, refusing to hear opposing counsel.[8] He was extremely frank and honest with the court, and on one occasion went so far as to say that the opposing counsel was in the right and himself in the wrong.[9] "My own opinion," he admitted to the court in this case, "is that the law is correctly stated by Mr. Ronald [the opposing counsel], but the point has been otherwise determined in the general court." Marshall, of course, lost. Ibid.

Nearly all the cases in which Marshall was engaged concerned property rights. Only three or four of the controversies in which he took part involved criminal law. A considerable part of the litigation in which he was employed was intricate and involved; and in this class of cases his lucid and orderly mind made him the intellectual master of the contending lawyers. Marshall's ability to extract from the confusion of the most involved question its vital elements and to state those elements in simple terms was helpful to the court, and frankly appreciated by the judges.

[7] A good illustration of a brilliant display of legal learning by associate and opposing counsel, and Marshall's distaste for authorities when he could do without them, is the curious and interesting case of Coleman v. Dick (1793) 1 Wash. (Va.) 233. Wickham, for appellant, and Campbell, for appellee, cited ancient laws and treaties as far back as 1662. Marshall cited no authority whatever.

[8] See Stevens v. Taliaferro 1 Wash. (Va.) 155, Spring Term, 1793.

[9] Johnson v. Bourn, 1 Wash. (Va.) 187, Spring Term, 1793.

## *The Judge at the Banquet*

It was a friendly gathering
When mirth and wit and wisdom ruled,
Each lawyer happy as a King
In courtesy and valor schooled.

Serene and dignified he stood
Before his fellows whose acclaim
Betrayed that all his works were good,
Bespeaking honor to his name.

In modesty he grandly bore
The honors fairly on him thrust,
And with a grace becoming wore
The priceless laurels of the just.

No honest man could envy hold
Against him nor his praise begrudge,
For he was of a peerless mold,
An able, fearless, righteous Judge.

Wm D Fitten

# State Budget Reform

BY C. C. WILLIAMSON, PH. D.

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CONSIDERABLE attention has been given in the last two or three years to methods of making appropriations for the support of state governments. An examination of the messages of the governors to the 1917 legislatures, over forty of which are in session this year, shows a widespread demand for a more businesslike and efficient control of public expenditures. This effort to secure improved methods is frequently referred to as "budget reform." As a matter of simple fact, the problem in most states is not one of *reforming* a budget system, but of taking the very first steps towards the adoption of any kind of a budget. It is perfectly proper to speak of tax reform, because every state has some kind of a tax system which is capable of improvement; but few states have a budget system to reform. Under the title selected for this article, therefore, it is proposed to discuss reform of procedure in the making of appropriations through the introduction of a budget.

Almost everyone who writes or budgets feels called upon at the outset to frame a definition or to explain what he means by the term budget. While all such definitions agree in some important respects, no one has expressed the essential ideas better than the Special Committee on State Budget System of the Boston Chamber of Commerce in a report recently prepared.

"Boiled down," says the committee, "the question of a state budget is simply the application of common sense to the state's financing. Common sense dictates that before the annual appropriations are made, careful estimates of the probable revenues available, and of the probable expense to be met, should be at the service of the authority which recommends and the authority which determines expenditures. The recommending authority should submit a carefully considered and comprehensive plan of the year's financing; the determining authority should adopt a comprehensive plan. Such a comprehensive plan is a budget."

It requires but a very rudimentary knowledge of state government as it has been actually carried on in this country to appreciate that the dictates of common sense have had little to do with the making of appropriations. The fundamental fault has been the total absence of careful, comprehensive, responsible, and understandable planning of expenditures.

The old system, or lack of system, is well described by Governor Lowden of Illinois in his inaugural address delivered to the 1917 legislature. Speaking of the "need for a budget," he said: "Our present method of appropriations is a vicious one. The head of each office, board, or commission prepares his own estimate of appropriations. His responsibility is limited and his outlook is narrow. He is not required to see beyond his own department, which he is ambitious to extend. He is not likely to be sparing in his requests. He very often asks for more than enough, and he usually gets it. His estimate is made without reference to the necessities of other departments, and without reference to the income of the state.

"The estimate is referred to the appropriations committee, which grants a hearing. That committee is without the time, means, or opportunity for adequate investigation. It exercises its best judgment, but it must, of necessity, usually take the estimate of the officer, and generally passes his appropriation, which may be too much as compared with the

necessities of other departments or with the income of the state. This system means intelligent, state-wide planning."

Another common fault of the old system has been pointed out by the chief budget officer of California, a state which in the last few years has adopted a budget system. "Under the old system," says Mr. J. F. Neylan, Chairman of the State Board of Control, "the legislature met and simultaneously the heads of departments and institutions left their posts and traveled to Sacramento. Here they stayed throughout the legislative session, begging, wheedling, and whining for money enough to properly transact the public business. Of course, they promised jobs to friends of legislators in return for votes; of course, they promised to aid some constituent of a senator who happened to be in the flour or coal business; of course, they neglected their work for three months or as much longer as the legislature lasted."

The catalogue of evils which have been more or less common under the old system, by which the legislature acted independently of the governor and without a definite or adequate plan for the state as a whole, is a long one. Separate bills prepared by the departments themselves and introduced through members of the legislature; bills unreported until the very end of the session and then rushed through without the possibility of their being discussed or understood by anyone; miscellaneous appropriations of unknown totals scattered throughout the session; revenues in the form of special funds expended without appropriation, —these are some of the elements of planlessness which has resulted in extravagance and the alarming increase in expenditure which has at last forced upon us the need of a budget system.

The essence of budget reform is comprehensive and intelligent planning in the fiscal affairs of the state. As will presently be pointed out, considerable difference of opinion prevails as to who should be responsible for the preparation of the plan. But before taking up that question it is important to have clearly in mind the various steps to be taken in the preparation of a scientifically constructed budget.

The first of these steps is the preparation of estimates of the amount needed by each department, office, or institution seeking an appropriation, and an estimate of the revenues available to meet the expenditures to be authorized. The making of estimates of expenditures is a highly technical process, usually attended to by the department heads with the aid of subordinates familiar with the details of the work to be done. Such estimates must be made on or before a given date, following some uniform plan, and accompanied by data as to allowances, expenditures, etc., during preceding fiscal periods, with explanations of changes recommended.

A rigorous examination and criticism of these estimates by some central authority to whom they are submitted constitutes the next step in the budget-making process. This examination should be conducted so far as possible by technically trained and experienced administrative officials, and may be followed by hearings at which officers making estimates are given an opportunity to defend their requests.

Following this review of estimates the budget-making authority draws up his proposals or plans and submits them to the legislative body for amendment or criticism, approval or rejection. At this stage the legislature may institute independent inquiries and hold public hearings on the proposal or budget.

Finally, a bill or bills embodying the budget proposals are introduced, which, when passed, become appropriation acts or authorizations to spend.

The need of a budget is scarcely debatable, but the question as to who shall direct the compilation of estimates, and who shall formulate the budget, gives rise to marked differences of opinion. On the one hand are those who advocate an executive budget, some of them even going so far as to insist that a budget is not a budget unless it is prepared by the executive and submitted by him to the legislature, which may not increase, but only approve, reduce, or strike out items. On the other hand are to be found those who acknowledge the need of reform in appropriation methods, but consider both the initiation and approval

of fiscal plans as primarily a legislative function.

In many states budget reform has been accomplished without the adoption of either the "executive" or "legislative" budget, by placing authority in the hands of independent officers or boards composed of both executive and legislative officials.

No better illustration of an "executive" budget can be found than the plan devised in 1915 by the New York State Constitutional Convention and defeated at the polls. Under this plan all departments except the legislature and judiciary were required to submit to the governor by November 15 itemized estimates of their financial requirements for the next fiscal year. After public hearings on these estimates the governor could revise them according to his best judgment and not later than February 1, he was required to submit to the legislature an itemized budget containing all proposed expenditures and estimated revenues, together with appropriation bills, taxation measures proposed, and fiscal data relating to past years. During the consideration of the budget the governor and the heads of departments were to have the right and duty of appearing before the legislature, which could strike out and reduce items, but not increase any except those for its own support and for the judiciary. Not until after the appropriation bills proposed by the governor had been acted upon by both houses could the legislature consider any further appropriations, and then only in the form of separate bills each for a single object and subject to the governor's approval.

The legislatures of both Minnesota and Nebraska in 1915 made the governor the chief budget officer. In Nebraska (chap. 229) the governor is required to prepare and transmit to the legislature at the opening of the session a detailed and summarized estimate of the revenues and expenditures for the ensuing biennial period, with a brief explanation of any changes recommended. Every state officer is required to assist in the preparation of the budget if called upon by the governor. In Minnesota (chap. 356) estimates must be prepared in accordance with prescribed forms and submitted to the governor, who revises them in consultation with the chief executive officers, and prepares the budget.

The voters of Maryland at the November, 1916, election ratified a constitutional amendment which gives that state a thoroughgoing executive budget quite similar to that provided by the rejected Constitution of New York. The governor is required to present to the legislature, soon after it convenes, a plan of expenditures and estimated revenues for the ensuing biennium, together with other pertinent financial data. In making up his budget the governor may require estimates to be submitted in such form as he prescribes. He may also hold public hearings and require the attendance of department heads and other officials. Estimates for the legislature, judiciary, and public schools must be included without revision, but most other estimates the governor may revise as he chooses, and at any time before final action may make corrections, amendments, or supplements. The legislature may increase or diminish items relating to itself, and may increase items relating to the judiciary, but beyond that may only strike out or reduce items included in the governor's budget. Until the budget bill has been finally acted upon, additional appropriation bills may not be considered, and every such supplementary appropriation must be embodied in a separate bill limited to a single object. It must also receive a majority vote of all members elected, and must provide a tax to cover the amount of the appropriation.

The New Jersey legislature also provided last year (chap. 15, Laws of 1916) for a modern executive budget.

It was pointed out at the beginning of this article that the essence of a budget system is careful and comprehensive planning of public expenditures, followed by deliberate and thorough scrutiny of that plan by the legislative body before it is authorized in the form of appropriation acts. It is manifestly not essential that the budget proposals should be prepared by the executive, though the reasons for the executive budget appeal so strongly to many authorities that they

even refuse to use the term budget to describe plans for revenue and expenditure prepared by legislative authorities, or by committees, boards, or other machinery created for that purpose in different states. Advocates of the executive type of state budget use the following arguments: (1) The Constitution lays on the governor the duty of enforcing the laws. This he does by the aid of the departments whose expenditures form a large part of the budget. His sources of information and familiarity with the needs of departments mark him as the logical person to apportion the revenues. (2) The people of the state hold the governor responsible for the economical and efficient conduct of state affairs. This responsibility is concentrated and reinforced by requiring him to prepare the budget, which necessarily carries with it detailed administrative plans and proposals. (3) The governor represents all the citizens and all the interests of the state; a legislative committee, on the other hand, is responsible to no one, while its individual members are responsible to but a small section of the state.

Certain objections, may, however, be urged against the executive budget. The incoming governor, if newly elected, does not have the assumed familiarity with the details of the various state activities and their financial needs. Governor Whitman, for example, has publicly declared more than once that he went into office totally ignorant of the state's finances. Where the governor is elected annually, as in Massachusetts, it must frequently happen that however able and industrious he may be he does not have time to gain the familiarity with the administrative details which the theory of the executive budget assumes. To some it appears that the executive budget constitutes an usurpation of legislative power by the governor, particularly if the legislature is denied the power to increase items or add in any way to the governor's budget.

The imagined danger of executive encroachment on other branches of the government is guarded against by the provision found in the Maryland law and in the New York proposal, depriving the governor of power to revise the estimates of the legislature or the judiciary. The wisdom of making even this exception is doubtful. The legislative and judicial branches of the government have been even more extravagant and uneconomical than the administrative departments and state institutions. It might be most wholesome for them also to have their estimate subjected to the same scrutiny bestowed on the other branches.

At all events, the danger of the governor's usurping legislative functions through an executive budget is not so real as the danger to executive functions inherent in a legislative budget such as New York is now experimenting with.

Jealous of its power of control over the public purse and fearful that a real executive budget would give the governor too much power, the legislature last year established (chap. 130, Laws of 1916) a "legislative budget" system. The finance committee of the senate and the ways and means committee of the house, acting jointly or separately, are required to prepare and submit to their respective houses not later than March 15 a complete and detailed budget, accompanied by an itemized and detailed statement of the probable revenues and such other data as the committees may wish to submit. These two committees are empowered to sit continuously and to appoint subcommittees to gather information as to the financial needs of state departments, offices, and institutions. The obscure clerks of these committees are thus made the real budget officers by giving them the power and duty of collecting information as to revenues and appropriations requested. The faults of such a budget procedure are strikingly set forth in the following criticism by a high authority on budgetary methods:

> The new law, he says, will give permanency to the plan of invisible government by incorporating in law the standing-committee system upon which the legislative oligarchy depends for its monopoly. It will make the committee on finance and the committee on ways and means, both of which are irresponsible and are almost unknown to the public, the absolute masters over the administrative departments of the state. With deadly precision, guaranteed by a paid staff of searchers, they can tear open, tear down, and build up

> administration at their will. . . . It will put into their hands the machinery for wresting away from the governor such shreds of executive power as are now left to him. . . . The office of governor might as well be left vacant.

One does not need to share this alarmist view of the legislative budget to see in it elements of grave danger to the independent, responsible, executive power and to the economical and efficient control of the state's finances. It must not be forgotten that the legislature is an approving, and not an initiating, body. A plan made up by a legislative committee will not receive genuine criticism at the hands of the legislature, for nobody can be depended upon to criticize his own work. An appropriation measure prepared by the legislature necessarily represents a compromise between different districts and interests represented. The entire history of legislative bodies shows that this process leads to "logrolling" and wasteful expenditure. This is not a theory, but a well-known fact. Governor Norbeck of South Dakota, in his message to the 1917 legislature, urges the adoption of a constitutional amendment to provide a budget system. "The present method of appropriating public moneys," he declares, "is unsound and wasteful. It leads to trading, bickering, and logrolling, not only on appropriation bills, but also on bills of general interest to the people of the state."

In spite of the important theoretical advantages of the executive budget it may be found that under conditions as they exist in American states budget-making should be intrusted to some officer or body not under the direct control of either the legislature or the governor. On the income side of the budget the need for reform is not so apparent. Estimates of revenues may as well continue to be prepared by the chief fiscal officer, —auditor or comptroller. Possibly sound budget practice could be worked out with the auditor as the budget officer, receiving the estimates and preparing the budget. In no state, however, does the auditor possess sufficient power to revise estimates, and it is doubtful whether it should be given to him.

Ohio has been experimenting with a special budget officer entitled "budget commissioner," who reports directly to the governor. In most states, however, attempts to effect budget reform have resulted in the creation of a body made up of both executive and legislative officers, of which the governor is usually, but not always, chairman. New York tried such a board in 1913. In California the State Board of Control has complete jurisdiction over the expenditures of forty-three state departments and twenty-three state institutions. A similar measure enacted in Louisiana in 1916 puts the preparation of the budget into the hands of a Board of State Affairs composed of three persons. Connecticut in 1915 created a State Board of Finance composed of three electors appointed by the governor for six-year terms, acting with the treasurer, comptroller, and tax commissioner, *ex officio*. This board prepares a budget and submits it to the legislature. A State Board of Finance created in Washington two years ago, and composed of the governor, auditor, and treasurer, also prepares a budget for recommendation to the legislature. In Vermont the Budget Act of 1915 created a Committee on Budget, consisting of the governor (chairman), auditor of accounts (secretary), state treasurer, chairman of the finance committee of the senate, chairman of the ways and means committee of the house (or a member of these committees designated by the chairman), and the state purchasing agent. A State Budget Board created by North Dakota in 1915 is composed of the governor (chairman), the attorney general, the state auditor (secretary), and the chairman of the appropriation committees of the two houses of the preceding legislature.

From this brief survey it is apparent that American states are attacking the problem of budget reform all along the line. Each is seeking to solve the problem in its own way. The results obtained from the different kinds of budget machinery already created should be carefully watched. Conditions in the various states are not essentially different, so that a budgetary method which succeeds in one state should have a presumption in its favor for every other.

# *Inequalities of the Federal Income Tax*

*BY THOMAS G. FROST, LL. D., Ph. D.*

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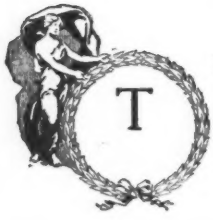

THE Federal income tax has a vast number of friends among those individuals who are exempt from the payment of the tax. The purpose of this article is not to attack the income tax in principle, but to point out its serious defects, both in its operation and in the method of its administration.

Ideally, all persons possessing a definite income should pay their just proportion of the total income tax levied. It is now universally conceded that a person having only a small income should not be compelled to pay out as large a proportion of his income in the form of a tax as is required of the individual having a much larger income. In other words, it is conceded that a tax of 1 per cent upon the income of a man receiving $4,000 annually might be far more burdensome to him than a tax levied at a similar rate upon the income of an individual having an income of $50,000 a year. It is the proper recognition of this principle that induced Congress to provide a surtax or additional income tax upon all incomes exceeding $20,000 per annum in amount.

Under the provisions of the General Revenue Law approved September 8, 1916, an additional income tax (that is, in excess of 1 per cent per annum upon all incomes up to $20,000) is provided as follows:

1 per cent per annum upon the amount by which such total net income exceeds $20,000, and does not exceed $40,000;

2 per cent per annum upon the amount by which such total net income exceeds $40,000, and does not exceed $60,000;

3 per cent per annum upon the amount by which such total net income exceeds $60,000, and does not exceed $80,000;

4 per cent per annum upon the amount by which such total net income exceeds $80,000, and does not exceed $100,000;

5 per cent per annum upon the amount by which such total net income exceeds $100,000, and does not exceed $150,000;

6 per cent per annum upon the amount by which such total net income exceeds $150,000, and does not exceed $200,000;

7 per cent per annum upon the amount by which such total net income exceeds $200,000, and does not exceed $250,000;

8 per cent per annum upon the amount by which such total net income exceeds $250,000, and does not exceed $300,000;

9 per cent per annum upon the amount by which such total net income exceeds $300,000, and does not exceed $500,000;

10 per cent per annum upon the amount by which such total net income exceeds $500,000, and does not exceed $1,000,000;

11 per cent per annum upon the amount by which such total net income exceeds $1,000,000, and does not exceed $1,500,000;

12 per cent per annum upon the amount by which such total net income exceeds $1,500,000, and does not exceed $2,000,000;

13 per cent per annum upon the amount by which such total net income exceeds $2,000,000.

It may be conceded for the purpose of this article, that the foregoing provisions represent, so far as they go, a fairly scientific and reasonable graduated income tax. That is to say, that the in-

come tax bears with substantial equality, so far as the burden of the same is concerned, upon each of the several classes of incomes enumerated in the act. When it comes to the administration of the act it has given rise in the past, and will doubtless give rise in the future, to much severe criticism. On this subject the New York Times in a recent editorial spoke as follows:

"Congress enacts and the Treasury administers the revised income tax and the special corporation tax upon the theory of what ought to be. But the intention of neither is at all times clear. Then the courts are called upon to fit the law to the facts which cannot be altered by edict. Congress and the Treasury take every presumption against the taxpayer. The taxpayer takes what presumptions he can against his tormentors. The courts favor neither, because they take neither profit nor loss by their decisions, and it is their function to make decisions of disputes without fear or favor. As a rule the decisions of the courts are more popular than those of the tax officials. That will be the case in the rejection of the government's claim for the payment of the tax on $6,749,000 by a corporation. Although it is a corporation case, its principle is applicable to one of the most unpopular rulings of the Treasury regarding the taxation of profits and losses as income. The principle announced by Federal Judge Manton is that the facts control the theories, and that there is a distinction between income and receipts. It follows that bookkeeping may disclose receipts which are not taxable as income.

"The case was that a corporation sold for $100 a share 112,490 shares which it had carried upon its books for $1 a share. The government claimed that the difference was income, and taxable. There was no question or secrecy about the facts. Repeatedly the reports of the corporation had remarked that although it carried the shares at $1 they were earning at a progressive rate which was making the shares more valuable. Increasing values were named at various sums at various times. The two corporations had substantially the same shareholders, and it was all the same to them whether the bookkeeping values were $1 or $60. The enlarged values represented the establishment of a hazardous industry which it would have been imprudent to distribute in the earlier stages. The company was earning its capital, and there were no earnings properly divisible until the period of infancy was passed. For the government to claim the sale price as income was to tax property as income and to tax the earnings of several years as income of one year. The decision of the Supreme Court is:

"'The net income of a corporation is not to be determined by bookkeeping facts, but by real facts. An increase in the book value of the assets of a corporation by a revaluation of property does not constitute any part of the gross amount of its income received within the year.

"'The word "income" is not synonymous with the word "receipts." Income as used in the statute must be considered in contradistinction to property and invested capital.

"'It is manifestly the purpose of the statute to tax the net income for the year in which the assessment is made. . . . It follows that there is no income, gain, or profit accruing to the defendant during the taxable year.'

"It would be interesting to apply this doctrine to the cases in which individuals sell property at a profit after the lapse of years, showing in one year the gains of many, and which the government claimed were the income of one year. It would seem to follow, also, that where there are losses over a term of years, they are not deductible in any one year. The Treasury practice has not been consistent. In some cases it apportions gains. It ignores losses except in trade. That would seem to throw doubt upon the court's declaration that facts control, not bookkeeping fictions."

Of course the Treasury Department officials at Washington issue numerous forms calculated to assist the taxpayer in determining the amount of his net income on which the tax is payable. But even here much confusion and uncertainty is found. Recently a certified public accountant, through the medium of a letter to one of the New York papers, called attention of the public to some of the uncertainties just referred to. The letter here referred to reads as follows:

"The phraseology of government attorneys as reflected in all their tax forms is obscure, to say the least, as evidenced by the thousands of inquiries received by the Treasury Department for interpretation.

"On the face of the form 707, article 8, it states that 6, 7, and 8 should be multiplied by 9 to ascertain the total stock value. Six refers to share value and 7 to number of shares; 9 refers to the deduction of $99,000. It is evident that the multiplication referred to would not give the result as stated. The Treasury Department have admitted this, and now say it should read, '6 multiplied by 7,' which is correct.

"Under 'General Instructions' (1) it states that the tax is for the six months ending June 30, 1917, payable in January, 1917, and under (2) that it is due January 1, 1917, for the fiscal year July 1, 1915, to June 30, 1916, thus referring to different years and different periods. How many persons will understand from the reading that the value of stock in the fiscal year mentioned is the value on which

the tax is to be paid for the first six months of 1917? Under (13) it repeats what was stated under (1), and adds, "will be for 25 cents per $1,000 of such remainder" (meaning over $99,000). Why did it not state all this under (1) in a few concise words?

"Again, under (2) it states that corporations having stock issued and outstanding whose market value is $75,000 must make return. This is not complete in meaning, as under (7) it states that every corporation whose stock is worth $99,000 must make a return. The first interpretation was that if a corporation did not have capital stock outstanding for $75,000 and of a market value of the same amount, no return was required. We next learn that if the value of the stock of any corporation is over $99,000 it must make a return regardless as to whether it has more or less than $75,000 capital stock, and without respect to its market value or the amount issued and outstanding. Why not have said so in the first place?

"The executive head of the largest manufacturing concern in its respective line of business comments as follows: 'I do not see why Federal income tax forms should be so absolutely beyond comprehension. We have too many lawyers in Congress. No officer of a corporation should sign the forms without legal advice.'"

But the greatest defect of all in the Federal income tax is the fact that it bears unequally upon the taxpayers in different localities, for the reason that the amount of tax exempt is far above what it should be if a just and fair operation of the law is sought for. Under the present law a net income of $3,000 plus $1,000 additional if the person making the return be the head of a family, or a married man with a wife living with him, or plus the sum of $1,000 additional if the person making the return be a married woman with a husband living with her, is exempt. By reason of this provision the normal income tax from individuals for the year ending June 30, 1916, was not quite $24,000,000.

Now, it is a well-known fact that Great Britain is a far less wealthy country than the United States, and yet in 1914 Great Britain reported gross incomes ranging from a minimum of $780 to a maximum of $3,895, amounting to $911,000,000. In Great Britain this entire gross income is subject to the payment of an income tax. Conservative authorities estimate that the wealth of the United States at the present time is two and one quarter times that of Great Britain. On this basis there should be in the United States gross incomes amounting to $2,049,000,000, on which an income tax of 1 per cent should be paid if the present law were extended so as to cover incomes from $780 per annum up. On the basis of 1 per cent this would provide additional revenue for the United States government, amounting somewhere in the neighborhood of $200,000,000. If the law were so extended the excessive burden of the present income tax borne by the states of New York, Pennsylvania, Illinois, and Massachusetts would be lessened very materially.

During the fiscal year ending June 30, 1916, the Federal government received from individual income taxes levied during that year, some $68,000,000. Of this amount $45,000,000 was paid by the four states of New York, Pennsylvania, Illinois, and Massachusetts. The tax as it is now levied imposes a penalty not only upon financial ability, but upon the tendency to save as well. The truth of the matter is that the statesmen from the southern and western states are too untiring in their efforts to please the non-income paying voter at the expense of the numerically smaller, but wealthier, portion of our fellow citizens.

The income tax has come to stay. Of this there is no question. But in the interests of justice, for the purpose of equalizing taxation so that all may feel its burdens, it ought to be so extended as to include within its provisions all individuals receiving incomes of $1,000 or more.

Wm. G. Frost

# A Short Way to Find Legal Authorities

BY BURDETT A. RICH

ROADLY speaking, there are two widely different ways of searching for the law on a doubtful question. One is to search in indexes, digests, treatises, etc., for the subject matter under its topical arrangement. This is the usual method followed by most lawyers, and in many instances there is no substitute for it. The other way is not available in all cases and is much less generally practised. Some lawyers have never learned its value. Yet, it may often furnish the easiest, swiftest, and surest way to find the authorities needed. It has the peculiar advantage, when it can be used, that no one need stop to inquire what classification or topic to examine. But its use is limited to instances where one can start with some particular decision bearing on the question he wishes to investigate. Then by citation references he can go directly to the volumes and pages of all the reports where that case has been cited and find everything that the courts have ever said about it. This the veriest wayfaring man in the profession can do, although he might have very little idea where to search for such cases in treatises or compilations of law. Even a very able lawyer cannot always think quickly where to look for information on some question when its relation to settled principles is somewhat obscure, or when it involves a conflict of principles. In such instance, if he can start with a particular case on his point, he may find that to be a master key to the authorities he needs. The later cases will tell him whether his case has been approved, strengthened, and broadened in its authority, or whether, on the other hand, it has been disapproved, limited, distinguished, or in any way weakened or discredited. Many times by this process he will quickly get all the authorities he needs, and sometimes when it would have been difficult indeed for him to get them in any other way. Even if he has no case exactly in point to start with, he may take the citations of some leading case on the general principle, and by following them through the various applications of that principle find just the decision he needs.

While many lawyers have long ago learned by experience the very great value of this simple method of finding needed authorities, some have never formed the habit of using it. Others may have had a disappointing experience in attempting to use some collection of citations in which all those of a particular case, no matter how many points were decided in it, were indiscriminately mingled. Certainly one who goes through numerous citations of a case only to find that none of them are on the point he is seeking will be discouraged. But at the present time the best citation books, like those of the Frank Shepard Company, so index the citations of every case that one need consult only those that are on his point without wasting any time upon others that are irrelevant. This adds immensely to the value of such work; and such citations can now be had for the decisions of almost every state and jurisdiction in convenient and compact form, ready for instant use in testing the present value of any decision in that jurisdiction in the light of later cases.

For some important sets of reports, such as United States Supreme Court Reports, Lawyers Reports Annotated (first series), American Decisions, American Reports, English Ruling Cases, and a considerable number of state reports, including California, Ohio, Illinois,

Minnesota, North Dakota, South Dakota, Texas, and some others, citations of the reported cases are prepared in more elaborate and extensive form by incorporating with each citation of every case therein a brief statement of the exact application and effect given to it by the citing case. Rose's Notes on the United States Supreme Court Reports was the first work of this class, and the widespread recognition of its value led to the preparation of similar notes for other sets of reports. The name "Notes" as adopted in "Rose's Notes" has been generally used for such work, though in the case of the L.R.A. the name "Extra Annotations" is used. By thus editorially working out an analysis and statement of all the points to which any case in these reports has been cited in later opinions, the whole history of that case and its value as a precedent in the light of later decisions that have cited or reviewed it are placed directly before the reader in clear and concise form, without making it necessary for him to have access to the reports of the citing cases.

Of course, it is not to be supposed that a case will necessarily be cited in every later case involving the same question, or that tracing its citations will certainly find all the valuable cases on the point involved in it. But the history of an early case furnished by its citations will almost always open up a valuable line of authorities, and in many instances it will substantially cover the development of the law on the point decided in it.

For a single illustration, see how the evolution of the entire law of the subject of corporation charters can be traced through the citations of the Dartmouth College Case, 4 Wheat. 518, 4 L. ed. 629.

A very simple but extraordinarily valuable increase of the usefulness of citation books is made where, in addition to the citations by the courts, there are also included the citations of the cases in editorial annotations of the leading series of annotated reports. Such an editorial citation constitutes in fact a full annotation of the case on the question in hand, because that case is there compared and reviewed in the light of the authorities from all jurisdictions. A surprisingly large number of the decisions of every state will be found to have been now cited in such annotations, and the citation of any of them on any question will lead the lawyer at one step to a place where the work of collecting, marshaling, analyzing, and reviewing the whole body of the decisions on that question has already been done.

It may seem superfluous to emphasize to lawyers of this day the advantages of this very simple method of finding authorities, but many lawyers make little, if any, use of it. Its limitations have been pointed out and are obvious. It will not always be helpful; but a citation book at hand can be consulted in a moment, and the results will often be valuable beyond expectation.

Burdett A. Rich

# *Popular Control of Governmental Finances By Executive Budgets*

*BY L. G. POWERS*

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UR revolutionary fathers laid the foundations on this continent of what Lincoln so aptly described as governments of the people, by the people, and for the people. For the citizens of the United States and for those of the British Empire and of some other nations, the beginnings of such governments date back to the signing of the Magna Charta, when the barons of England wrested from the King the right or power of certain control over governmental finances. From the event mentioned to the present time, the ideal of governments giving life to the democratic movement in monarchical England, in British dependencies, and in the republican United States, is one which has as its central and most vital purpose or object that of securing and maintaining a popular control of governmental revenues and expenditures, or, as it has sometimes been expressed, popular control over governmental purse strings.

So far as that control has been or can be secured, it is expressed through two classes of legislative acts. One of these includes acts appropriating money, or authorizing governmental officials to expend specified amounts, for stated objects or purposes and by prescribed ways or methods. The other is constituted of acts for raising revenues, or otherwise providing money for meeting authorized expenditures. In Great Britain, where ordinarily only one bill is introduced for appropriating money, and where its presentation is always accompanied with a statement of the revenue measures proposed for financing the costs of government, the given bill and statement, considered as a single whole, have long been called the budget. The same term is also there applied to the appropriation bill and revenue measures after enactment into law. So far as the people of Great Britain have control over their governmental finances, it is exerted through the budget. The various British dependencies and municipalities all have budgets patterned more or less closely after that of the imperial government, and in all cases these budgets are everywhere recognized as the instruments of popular control over governmental finances.

The term "budget" has been borrowed by the people of the United States from Great Britain. As here used, its significance is somewhat different from that assigned to it in the mother country. Here the term is most frequently employed in speaking of the appropriation bill or bills introduced into legislative bodies, and the act or acts which result therefrom. In our national and state legislatures, the introduction of the given bill or bills is seldom accompanied with any formal statement of the special revenue measures which will be required, or are recommended for financing appropriations. It should be said, however, in this connection that those in the United States who are most earnestly striving to secure greater popular control over governmental finances or greater efficiency in governmental management are endeavoring to have all proposed financial legislation for a given year somewhere and somehow presented in a single bill accompanied with a statement of suggested methods of financing the costs of government. These people urge that this bill and statement should be presented as a single complete financial

program submitted not only for legislative action, but for popular consideration. When those urging the adoption of this governmental procedure use the term "budget," it is generally as the designation of a single appropriation bill or act accompanied with revenue bills or statement, which, with the appropriation bill or act, constitute a complete financial program for the year.

Governmental financial reform involving, with other changes, a greater popular control over the income and outgo of the nation, states, or municipalities, if ever secured, must be attained through the adoption of the principal features of the British budget system. Proposed appropriations and the legislation required for financing them must someway and by some one branch or subdivision of the public service be stated as a single whole and in terms which the people can understand. The demand for such a system in national, state, and municipal business management is each year becoming more and more insistent. That demand recognizes the fact that democracy, government of the people for the people and by the people, can prevail only to the extent that the people are fully informed and fully understand the proposed and accomplished acts of the government, and who is responsible for all details of said acts. It also recognizes the fact that democracy can only succeed when and as its governmental organization and methods of operation are simple and within the understanding of the masses. This is especially true of democratic control over governmental finances. Recognizing these facts, the modern demand for reform and improvement in the management of governmental finances is that governmental financial programs must be briefly but fully stated each year and presented as a single whole, and that appropriations and revenue measures be set forth in terms or by statements such that the general public can fully grasp their significance. To secure the preparation of such programs is the end or purpose of the modern American movement for the establishment or use of governmental budgets, which is frequently spoken of as that of budget reform.

But who shall prepare, submit, and be primarily responsible for the annual financial programs of the nation, states, or municipalities? Shall it be a committee of the lower house of Congress or other legislative body? or, shall it be a group of designated executive officials? At the present time, the foregoing are among the most important questions concerning the establishment and maintenance of further and better popular control over governmental finances and the attainment of more economical and efficient governments. They divide our governmental officials into two groups,—one advocating budgets such as those referred to, which may well be called legislative; and the other advocating the budgets last mentioned, which may properly be designated as executive.

In support of their contention, the advocates of legislative budgets, or budgets prepared by a committee or committees of the lower legislative chamber, are always ready to point to the fact that for centuries the lower house of the British Parliament, the House of Commons, has alone represented the people of that realm. That House, as the sole representative of the people, fought for and at last secured the right to originate, in the name of the people, all financial legislation, and that right thus attained has come in Great Britain to be known as the right of the people to control the national purse strings. In that nation, there is no possibility of popular control of governmental finances through any governmental body other than the one named. The advocates of legislative budgets never tire of calling attention to the foregoing facts, and also to the fact that some of the very important and fundamental provisions of our national and state constitutions are based upon the British experience and the unwritten constitution of Great Britain. Most of those constitutions give to the lower house of the legislatures the designation, "House of Representatives," in substantial recognition of the fact that the members of that House, like those of the British House of Commons, are *the* "Representatives of the people." Those calling attention to these facts continue by saying: If the people are to have control of

governmental finances, they must and can secure it only when budgets are formulated by one or more committees of that legislative body. In further support of this contention and the contention that governmental budgets, if prepared by anybody, should and must be prepared by or through the specified chamber, the advocates of legislative budgets call attention to the wording of certain articles of American Constitutions which require that all financial legislation shall originate in the lower legislative chamber.

But, are the facts cited by the proponents of legislative budgets conclusive proof that popular control of governmental finances should be sought through such budgets? or, that the desired control can alone be attained by any democracy in that manner? In seeking correct answers to these questions, it is well to look a little closer to the character of the British national budgets and the persons formulating them. To begin with, recognition must be taken of the fact that the members of the House of Commons are the only British national officials who are elected by votes of the people. Those members are thus the sole representatives of the people. But some of those members, under the working of the British Constitution, exercise other and different duties, and assume other and different responsibilities, from those exercised or assumed by any members of any legislative national or state body in the United States. These exceptional members of the House of Commons are the ones who belong to the British cabinet, or executive council of the nation, and direct the various executive departments of the government. They are executive officers who are elected by the people to serve at once as legislators and as executive officers, and in both capacities to serve as representatives of the people.

Attention is called to the foregoing fact, for the reason that the members of the British House of Commons who serve in the British cabinet or executive council are charged, with their subordinates and associates, with the duty and responsibility of formulating and presenting the British national budget. These men prepare the budget as executive officials, and not as legislators and members of the House of Commons. After formulation by the council as the act of the nation's chosen executives, the budget is submitted first to the House of Commons and later to the House of Lords. It is submitted first to the House of Commons, since constitutionally there, as in the United States, all financial legislation must begin, or originate, with the popular or lower legislative body. Though British financial legislation begins and constitutionally must begin with the House of Commons as ours must begin with the House of Representatives, the budget or financial program, which antedates legislation, is framed by representatives of the people serving as executive officers. Those officers are charged with the duty of framing the budget, because, as such officers, they are nearest to and most familiar with the actual operation and needs of the government, and are thus best fitted to prepare a financial program for the intelligent action of their fellow representatives acting as legislators. British experience, from which that of the United States takes its origin, has led that nation, therefore, to adopt and use executive budgets, and, so far as that experience can be of value to us or be considered as an example, it supports the adoption and use here in the United States of executive budgets in place of the legislative methods of making appropriations and passing revenue measures now in force.

Turning from Great Britain to this country, it is to be noted that in the United States the President of the nation, the governors of the states, and the mayors of the cities, and many other executive officials, are now elected directly by the people. Further, some of these officials, such as the President, are, by the people, given the power of appointing their chief assistants and subordinates. In the case of the President, these chief assistants and subordinates exercise administrative duties much like those of the British executive council or cabinet. All of these American officials elected directly, or indirectly chosen, by the people, are representatives of the people as much as the members of the

British cabinet, or the members of the legislative bodies of this or other countries.

Further, if some of these officials should assist in preparing budgets, they would be acting as representatives of the people as much as would a committee of the lower legislative chamber. Being representatives of the people, the voice of the people can be expressed through them as much as through the Congress, the legislatures, or the councils of cities. If these officials prepare budgets which are later first submitted to the lower legislative body, the action would be strictly parallel to the budgetary procedure of Great Britain. In that country, it is said that all financial legislation originates with the House of Commons. As legislative action it so originates. And yet action so originating is now and for many years has been previously outlined or formulated by chosen executives, in the shape of executive budgets as set forth above. If, now, it is not contrary to the British constitutional law for executives to formulate or prepare legislation which must legally originate with the House of Commons, it may be said that it is not contrary to American constitutional requirements for executive officers to prepare and submit budgets for first legislative action by the lower legislative bodies. Such action, whether wise or otherwise, is not a violation of the Constitution.

We now come to the question, is it the part of political wisdom for the American national, state, and municipal governments to empower and charge some of their executive officials with the duty and responsibility of formulating budgets or financial programs? Can the British system of executive budgets for submission to legislative approval be employed profitably and well in the United States as in the place where that system and our whole system of representative government originated? These questions constitute the crux of the whole subject. In seeking correct answers to them, it should be noted that executive budgets of certain kinds are even now being quite extensively employed in the financial legislation of large numbers of American cities, those having boards of estimate and apportionment, and those governed by commissions, or under the so-called manager plan.

When the charter of the greater city of New York was enacted in 1898, that charter gave to certain officials the power over financial legislation which was exercised by the British national cabinet. The group of officials exercising this power was designated as the Board of Estimate and Apportionment. It was almost wholly composed of executive officials. Since 1898 similar boards have been established in Rochester, in six second-class and a number of third-class New York cities, and in Baltimore, Md. In all of these cities the use of executive budgets has accomplished the following very desirable ends: It has brought municipal financial legislation more and more to popular consideration, and at the same time made that legislation more and more responsive to popular demands. In other words, it has brought that legislation more and more under popular control. In addition it has been a constant and growing factor working for more economical, efficient, and honest administration of municipal affairs. In the commission and manager governed cities, a small number, or a single official chosen directly or indirectly by the people, prepare executive budgets. In the commission governed cities, the officials who prepare these budgets as executives act upon them as legislators after they have been published for the consideration of the people. In the manager governed cities, the budget formulated by the executive manager is submitted for action of the legislative body selecting the manager. So far, in all of the commission and manager governed cities, as the executive budgets have been framed with a view of giving the people more information relating to municipal financial affairs, those budgets have been accompanied with and result in the same beneficent changes noted above with reference to cities with boards of estimate and apportionment.

The reason for the outcome above noted is not far to seek. The member of the city council of the average American city, as of the average state legislature, American Congress or British

House of Commons, represents the small constituency which elects him. Under ordinary circumstances, none of them represent the city, state, or nation as a whole. Each one is looking for and thinking of his constituency and in terms of its desires, instead of considering mainly or largely the needs or desires of the greater body,—the whole city, state, or nation. Such a mental attitude gives rise to and fosters "pork barrel" legislation, or graft in the interest of local communities. Such graft in turn fosters and incites individual graft and carelessness, and thus promotes wastefulness, extravagance, and inefficiency in all branches of government. These evils and defects cannot be cured nor greatly lessened until budgets are framed by men who truly represent the whole city, state, or nation. The only persons who are thus representative are the principal, national, state, and municipal officials.

By the use of a single executive budget submitted as a financial program, governmental organization is simplified, and its methods of operation brought within the comprehension of all. The people fully know whom to credit with all legislation that they approve and whom to hold responsible for what is wrong in financial legislation. During the last four years, the American people have had a striking illustration of the importance and value of the voice, influence, and action of the national chief executive in financial and other important legislation. The President and his chief advisers and the leaders of the two Houses of Congress have formulated a program of legislation, and succeeded in enacting more and better legislation than without the action of the President would have been possible. The writer is a Republican, and does not like all the acts of Congress thus made laws, but he does welcome the action of the President in legislation as the one great representative of the whole nation. In the things accomplished in the manner stated, the writer sees evidence that when President Wilson, or some successor in that great office, or some strong state governor, directs his attention and gives his thought and great influence to the reform of our vicious and imperfect ways of appropriating money, we shall have the first national or state executive budget. When an honest trial is made of such a budget in national or state affairs in the United States, the experiment will be attended with the same beneficent results which now accompany it in Great Britain and in such American cities as New York. Similar budgets will sooner or later be established in all classes of American governments as they now are in many of the cities. With the extension of the application of executive budgets will come gradually, but surely, more economical and efficient governments everywhere.

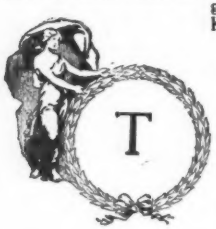
L. G. Powers

# *Tariff Commissions—Past and Present*


## *BY GEO. R. SHIELDS*

*Of the Washington, D. C. Bar*


[Ed. Note.—George R. Shields, Esq., the author of this article, was until recently an assistant to the Comptroller of the Treasury, in charge of accounts and claims growing out of government contracts. He has written the present article at the special request of the editor of CASE AND COMMENT. His article on "Claims against the United States," which appeared in last month's number of this magazine, was more in line with the special work upon which he has been engaged, and he has promised to write other articles along kindred lines for future numbers. Mr. Shields recently left the government service to become associated with the Washington law firm of King and King.]



TO SAY that this country has never had a scientifically constructed tariff law, i. e., a tariff law based on actual conditions at home and abroad and on the real needs of the Treasury as compared with the needs of all the industries, etc., affected by the law, is but to repeat a charge that has often been made by those in better position to know than the present writer. The best indication that such a charge is more or less true lies in the fact that there has never been a tariff act that was the unalloyed product of the labor of experts in such matters. All the tariff laws, at least in the last several decades, have been the children of log-rolling congressional parents, conceived under circumstances that negatived any real hope that they would be of permanent value to the country at large. Tariff laws have been the playthings of politics, and their provisions have often been dictated by those interests powerful or adroit enough to influence or control the politicians responsible for the laws, and they are likely to continue so while Congress, through its committees, is the sole tariff-fixing agent.

It has long been the dream of tariff reformers of the sort that wish to see a tariff law enacted which will meet the real needs of the country, that the regulation of tariff or customs duties be taken from the realm of politics altogether and delegated to a strictly nonpartisan business commission or board. Of course, such reformers do not lose sight of the constitutional provision which requires that revenue-producing measures "originate" with the House of Representatives, but they argue that this requirement was not designed to and does not in fact prevent the delegation by Congress to a properly constituted commission of part of the work incident to any proper making of tariff laws. Just how far Congress might properly go in the matter of delegating any of the tariff-making functions constitutionally conferred upon it is and always has been a mooted point; but it is not to be doubted that Congress might properly frame its revenue-producing laws in accordance with and as the result of facts collected and properly classified by a body of men expert in such matters, and that a law so framed would be more in accord with present-day needs than any law based on wholly inadequate and often misleading committee hearings would appear to be equally certain.

But any tariff commission to serve any real useful or constructive purpose must be something more than a mere committee on investigation. This is demonstrated, it would seem, by the history of the Tariff Board appointed by virtue of the Act of August 5, 1909 (36 Stat. at L. 83, chap. 6), which provided:

> "To secure information to assist the President in the discharge of the duties imposed by this section and the officers of the government in the administration of the customs laws, the President is hereby authorized to employ such persons as may be required."

By virtue of this authority the President appointed a Tariff Board of three persons, which set to work to investigate the cost of production here and abroad of the articles affected by tariff laws. Almost immediately, however, it discov-

ered a lack of authority to make investigations of that character, and it therefore confined its efforts, until the enactment of the Law of June 25, 1910 (36 Stat. at L. 703, chap. 384), somewhat broadened the authorized scope of its activities, to an investigation of alleged discriminations on the part of foreign countries against articles of American manufacture. It also decided to secure concise information as to each article in the existing Tariff Law, some of which information was easily available and could be quickly tabulated, including facts as to the chief sources of supply at home and abroad and methods of production, uses, statistics relating to production, imports, and exports. It also decided to make an inquiry into the actual cost of production, the practical limits of such an inquiry, and the difficulties reasonably to be expected in that connection, and to employ men of experience from particular lines of industry, both on the technical and commercial side, and to secure information regarding actual prices at home and abroad. The Act of June 25, 1910, so broadened the scope of its authority that it was enabled to follow the lines thus laid out, but during the life of this Board it found time only to make investigations of matters included in schedule "N" (pulp and paper), schedule "K" (wool and woolens), and schedule "G" (farm products), and it did make investigations along these lines, particularly on the wool and woolens schedule, submitting to Congress a report of the information collected by it. No action, however, was taken by Congress looking to any change in the existing laws. In fact, the Commission made no recommendation looking to any such changes. It merely tabulated certain facts and statistics which it conceived pertinent to the matters it investigated, and reported sueh facts to Congress. This Board, so far as tangible and actual results were concerned, was, it would seem, an absolute failure, unless possibly its reports may have led to the approval of the reciprocity pact with Canada, which enactment, however, resulted in nothing, because Canada refused to join in the agreement.

Somewhat different were the results accomplished by the Tariff Commission created by the Act of May 15, 1882 [22 Stat. at L. 64, chap. 145, § 3], which provided that a commission of nine be created, whose duty it was—

> "to take into consideration and to thoroughly investigate all the various questions relating to agriculture, commercial, mercantile, manufacturing, mining and industrial interest of the United States so far as the same may be necessary to the establishment of a judicious tariff, or a revision of the existing tariff, upon a scale of justice to all interests, and for the purpose of fully examining the matters which may come before it. Said Commission in the prosecution of its inquiries is empowered to visit such different portions and sections of the country as it may deem advisable."

The Commission was required to make report to Congress of the results of its investigation and the testimony taken in the course of the same not later than the first Monday of December, 1882.

This Commission, though greatly limited in the matter of time, was created for a specific purpose and given a clearly defined work to do; that is, to ascertain what changes, if any, were necessary in the existing law to effect what would constitute the "establishment of a judicious tariff." In other words, this Commission was designed to do in an impartial, effective, and businesslike way, what the committee on ways and means of the House and the finance committee of the Senate are supposed to do in a less efficient way by means of public hearings. The first session of the Commission was held at Washington on July 6, 1882. Other sessions were held at various of the larger cities of the country, at which considerable testimony was presented by importers, manufacturers, and others interested in tariff legislation. The public sessions for hearing testimony closed October 16, 1882, and the Commission submitted a comprehensive report to Congress, showing the results of the hearings it had held, and with its report it submitted a draft of a proposed law remedying defects in existing laws as disclosed by the information it had collected. With very slight changes by Congress, its draft of law was enacted and became the Tariff Act of March 3, 1883.

The results of the work of the two previous Tariff Commissions have been

referred to in some detail as shedding light on the real objects to be achieved by any properly constituted tariff commission. It is well known, and seems to be conceded by everybody, that the congressional machinery employed in the making of tariff laws is but a poor makeshift, and Congress gets, by means of public hearings held by its committees, a vast amount of information which the average member of Congress is utterly unable to classify and understand, and the real tariff making is done by a very limited few of the committees. A properly constituted tariff commission would doubtless relieve the committees of much of the work of collecting the necessary information, and would assist every member of Congress in properly classifying such information, and utilizing it to the best advantage in shaping the legislation.

The Act of September 8, 1916 (39 Stat. at L. 795), authorizes the creation of a new tariff commission to be known as the "United States Tariff Commission." It is to be composed of six members, having a term of office of twelve years each and salary of $7,500 per year. No member of this Commission when appointed may engage actively in any other business or employment, but all must give their whole time to the work of the Commission. The Commission is to have ample machinery for the collection of all needful information. It is to investigate the administration and physical and industrial effects of the customs laws of this country now in force or which may hereafter be enacted, the relations between the rates of duty on raw materials and finished or partly finished products, the effects of ad valorem and specific duties and of compound specific and ad valorem duties; all matters relating to the arrangement of schedules and classification of articles in the several schedules of the customs laws, and, in general, to investigate the operation of customs laws, including their relations to the Federal revenues, their effect upon the industries and labor question, and to submit reports of its investigations. The Commission is empowered to administer oaths and compel the attendance of witnesses, and is to have access to the private records of any person or corporation whose business it is deemed necessary to investigate in connection with revenue-producing questions. In other words, the Commission appears to have far more authority than any earlier Commission has ever had, and the scope of its activities is also much greater than was that of any earlier Commission. Of course, Congress is not bound by any finding it may make, and may accept or refuse to accept its recommendations; but the purpose of the act creating this latest Commission appears to have been to empower this Commission to do in an effective and businesslike way what the committees of Congress have heretofore tried to do; that is, to collect, classify, and present to Congress all the facts it is necessary to have when considering the enactment of a tariff law. This new commission has not, at the time of this writing, been appointed by the President, but it is confidently expected that when appointed its personnel will be of such a character as to command the complete respect not only of Congress, but of the country at large; and it is the hope of its friends that its work will be of a character that will lift future tariff making from the realm of petty politics to the plane of pure business. In other words, it is hoped and thought that the Tariff Commission as now provided for will be of a character comparing favorably with the Interstate Commerce Commission, which regulates all questions relating to transportation. Much will depend, of course, upon the personnel of the Commission and on the character of the first reports and recommendations submitted by it. If the members of the Commission go at their task in a businesslike way, intent only on securing accurate facts and making reports and recommendations that are required by the best interests of the country at large, the Commission will probably be a permanent fixture in our institutions.

Geo. R. Shields

# *State Farm Loans v. The Law*

*BY WILLIAM G. BOATRIGHT*

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IN THESE recent years much has been said about longtime government loans to farmers. The question has been discussed popularly and legislatively, both state and nationally. The Congress has enacted a law, and likewise legislatures. The Congress has assumed its legality; so also the states in the discussions heretofore reported. No issue has been raised concerning the ultimate legality and justice of the proposal. An investigation of law shows, however, that the Supreme Court of the United States has handed down a decision that will not support this conclusion. Indeed, so long as our present economic system is to continue it is to be doubted if such conclusion can ever be reached in natural justice. After a thorough investigation of the law and a careful examination of cases, there can be little doubt that any scheme whereby public moneys collected by taxation are to be loaned to private enterprises is but a flagrant violation of the inherent principles of our law, whether that scheme be state or Federal, and cannot be supported on appeal to the highest courts of our land. The material part of the leading case that leads to this conclusion is hereafter set out.

Reduced to its final analysis, the real issue becomes one involving the power of taxation, to wit, the legality of taxation for the purpose of loaning farmers money. A tax is a burden imposed by the legislative body upon the person or property for public purposes. Taxation is a mode of raising revenue for *public purposes only,* and, as it is said in some of the cases, when it is prostituted to objects in no way connected with the public interests or welfare, it ceases to be taxation, and becomes plunder.

The power to levy taxes is an incident of sovereignty, and, in our system of government, sovereignty, or the power to tax, is lodged with the legislatures of the several states. It is said there is no limitation on the legislature in its exercise of the power of taxation. It is conceded, nevertheless, that there are certain limitations upon this power, not prescribed in express terms by any constitutional provision, but inherent in the subject itself, which attend its exercise under all circumstances, and which are as inflexible and absolute in their restraints as if directly imposed in the most positive form of words. These limitations inhere as the essential conditions of the power to impose any taxes whatsoever, and it is only when they are observed that the legislative department is exercising an authority over the subject which it has received from the people. No discretionary power in that department is so absolute, as to preclude the citizen contesting it whenever he believes his rights have been disregarded in any of these conditions. This is true even though a majority of the qualified voters of the state may have so amended their Constitution as to ostensibly confer on the legislative body that degree of power. For no majority, however potent in many respects, has power to impose taxes upon the minority for the purpose of raising revenue to be devoted to mere private purposes.

First, let us inquire whether the purpose to be accomplished is a public purpose, in the sense implied when burdens are to be imposed under the legislative power over the subject of taxation.

The word "public" when employed in reference to this power is not to be construed or applied in any narrow or

illiberal sense, or in any sense which would preclude the legislature from taking broad views of state interest, necessity, or policy, or from giving those views effect by means of the public revenues. The breadth and narrowness of that word are to be found in the following statement of the law. Where an enterprise is conducted by private persons for their own private benefit, the public authorities having no control over the business and no share in the profits, it is a private enterprise, and not a public one, whether large or small, and whether profitable or unprofitable. No enterprise can properly be regarded as a public enterprise, within the meaning of the present discussion, in which the public has no voice.

It has been said to be too clear to need argument that it would be usurpation, and not legislation, to take the property of A and give it to B. It must be on the same ground equally illegal to tax A for the benefit of B; for the amount of property taken against his will cannot make any difference in the principle, neither can it make the wrong any less that he has companions in misery. Is this not the basic principle of all these proposed farm loaning schemes? Do they not, under the guise of taxation, take a portion of the material wealth of every taxpayer within the state and then from the coffers of the public treasury heap out the money so collected to the benefit and emolument of one class and at the expense of all the others? The question of whether the farmer needs money is not the test of these loaning schemes. We concede he does. So do all classes of citizens. But the discrimination by the state between the different classes of occupations, and the favoring of one at the expense of the rest, whether that be farming or banking, merchandising or milling, printing or railroading, is not legitimate legislation, and is an invasion of that equality of right and privilege which is a maxim of state government. When the door is once opened to it, there is no line at which we can stop and say with confidence that thus far we may go with safety and propriety, but no further. Every necessary employment that is honorable is to that extent beneficial to the public; it deserves encouragement. The more successful we can make it, the more does it generally subserve the public good. But it is not the business of the state to make discriminations in favor of one class against another. So long as justice, and not unrestrained gross selfishness, is to be the motto of governments, the state can never have favorites, either of individuals or classes. If the state loans money from the public funds to aid the farming enterprise because it needs it, and all the railroads allege their need of public assistance and call upon the farm class as a return of the favor to tax themselves for their benefit, what will the answer be? Will the farmer not, in justice and fair play, be constrained to grant their demands? Then all insurance men need aid; all lawyers need aid; all newspapers need aid; all the laboring men of every industry need aid; and where will the "needs of aid" not lead? The state cannot tax its citizens in order that it may keep upon its feet any business that cannot stand alone. Moreover, it is not a weak enterprise only that can give plausible reasons for public aid; when the state once enters upon the business of subsidies, we shall not fail to discover that the strong and powerful interests of private enterprise are those most likely to control legislation, and that the weaker will be taxed to enhance the profits of the stronger. Pursuing the idea to its logical conclusion, it would be only a matter of time until every part and parcel of taxable property would be sinking beneath the load of its tax, levied to give public aid to private enterprise. What an anomaly in our government! Do the farmers, the artisans, the common laborers, does any class of citizens, care to embark upon a course of legislation that so flagrantly violates those fundamental precepts of justice which are the basic principles of both state and Federal government and which have been declared to be the law of the land?

Below, the material part of the decision of the United States Supreme Court in the Citizens' Sav. & L. Asso. v. Topeka, is set out. Mr. Justice Miller

wrote the decision, which is found in 20 Wall. 655, 22 L. ed. 455.

"We have already said that the question is not new. The subject of the aid voted to railroads by counties and towns has been brought to the attention of the courts of almost every state in the Union. It has been thoroughly discussed and is still the subject of discussion in those courts. It is quite true that a decided preponderance of authority is to be found in favor of the proposition that the legislatures of the states, unless restricted by some special provisions in their Constitutions, may confer upon these municipal bodies the right to take stock in corporations created to build railroads, and to lend their credit to such corporations. Also to levy the necessary taxes on the inhabitants, and on property within their limits subject to general taxation, to enable them to pay the debts thus incurred. But very few of these courts have decided this without a division among the judges of which they were composed, while others have decided against the existence of the power altogether.

"In all these cases, however, the decision has turned upon the question whether the taxation by which this aid was afforded to the building of railroads was for a public purpose. Those who came to the conclusion that it was, held the laws for that purpose valid. Those who could not reach that conclusion held them void. In all the controversy this has been the turning point of the judgments of the courts. And it is safe to say that no court has held debts created in aid of railroad companies, by counties or towns, valid on any other ground than that the purpose for which the taxes were levied was a public purpose, a purpose or use which it was the right and the duty of state governments to assist by money raised from the people by taxation. The argument in opposition to this power has been, that railroads built by corporations organized mainly for purposes of gain—the roads which they built being under their control, and not that of the state—were private, and not public roads, and the tax assessed on the people went to swell the profits of individuals, and not to the good of the state, or the benefit of the public, except in a remote and collateral way. On the other hand, it was said that roads, canals, bridges, navigable streams, and all other highways, had in all times been matter of public concern. That such channels of travel and of the carrying business had always been established, improved, regulated by the state, and that the railroad had not lost this character because constructed by individual enterprise, aggregated into a corporation.

"We are not prepared to say that the latter view of it is not the true one, especially as there are other characteristics of a public nature conferred on these corporations, such as the power to obtain right of way, their subjection to the laws which govern common carriers, and the like, which seem to justify the proposition. Of the disastrous consequences which have followed its recognition by the courts, and which were predicted when it was first established, there can be no doubt.

"We have referred to this history of the contest over aid to railroads by taxation, to show that the strongest advocates for the validity of these laws *never placed it on the ground of the unlimited power in the state legislature to tax the people, but conceded that where the purpose for which the tax was to be issued could no longer be justly claimed to have this character, but was purely in aid of private or personal objects, the law authorizing it was beyond the legislative power, and was an unauthorized invasion of private right.* Olcott v. Fond du Lac County, 16 Wall. 689, 21 L. ed. 386; People ex rel. Detroit & H. R. Co. v. Salem, 20 Mich. 452, 4 Am. Rep. 400; Jenkins v. Andover, 103 Mass. 96; Dill. Mun. Corp. § 587; 2 Redf. Railways, 398, rule 2.

"It must be conceded there are such rights in every free government beyond the control of the state. A government which recognized no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. It is true it is a despotism of the many, of the majority, if you

choose to call it so, but it is none the less despotism. It may well be doubted if a man is to hold all that he is accustomed to call his own, all in which he has placed his happiness, and the security of which is essential to that happiness, under the unlimited dominion of others, whether it is not wiser that this power should be exercised by one man than by many.

"The theory of our governments, state and national, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of these governments are all of limited and defined powers.

"There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name. No court, for instance, would hesitate to declare void a statute which enacted that A and B, who were husband and wife to each other, should be so no longer, but that A should thereafter be the husband of C, and B the wife of D. Or which should enact that the homestead now owned by A should no longer be his, but should henceforth be the property of B. Whiting v. Sheboygan & F. du L. R. Co. 25 Wis. 188, 3 Am. Rep. 30; Cooley, Const. Lim. 129, 175, 487; Dill. Mun. Corp. § 587.

"Of all the powers conferred upon government that of taxation is most liable to abuse. Given a purpose or object for which taxation may be lawfully used, and the extent of its exercise is in its very nature unlimited. It is true that express limitation on the amount of tax to be levied or things to be taxed may be imposed by Constitution or statute, but in most instances for which taxes are levied, as the support of government, the prosecution of war, the national defense, any limitation is unsafe. The entire resources of the people should in some instances be at the disposal of the government.

"The power to tax is, therefore, the strongest, the most pervading of all the powers of government, reaching directly or indirectly to all classes of the people. It was said by Chief Justice Marshall in the case of M'Culloch v. Maryland, 4 Wheat. 431, 4 L. ed. 607, that the power to tax is the power to destroy. A striking instance of the proposition is seen in the fact that the existing tax of 10 per cent, imposed by the United States on the circulation of all other banks than the national banks, drove out of existence every state bank of circulation within a year or two after its passage. This power can as readily be employed against one class of individuals and in favor of another, so as to ruin the one class and give unlimited wealth and prosperity to the other, if there is no implied limitation of the uses for which the power may be exercised.

"To lay, with one hand, the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms.

"Nor is it taxation. 'A tax,' says Webster's Dictionary, 'is a rate or sum of money assessed on the person or property of a citizen by government for the use of the nation or state.' 'Taxes are burdens or charges imposed by the legislature upon persons or property to raise money for public purposes.' Cooley, Const. Lim. 479.

"Coulter, J., in Northern Liberties v. St. John's Church, 13 Pa. 104, says, very forcibly: 'I think the common mind has everywhere taken in the understanding that taxes are a public imposition, levied by authority of the government for the purpose of carrying on the government in all its machinery and operations,—that they are imposed for a public purpose.' See also Pray v. Northern Liberties, 31 Pa. 69; Re New York (Nassau St.) 11 Johns. 77, etc.

"We have established, we think, beyond cavil, that there can be no lawful tax which is not laid for a public purpose. . . ."

# *Options and the Rule Against Perpetuities*

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RE options which may at the pleasure of the owner of the option be exercised at once, at a future time not measured by lives nor years, or, if he please, not be exercised at all, void by reason of the rule against perpetuities? In discussing this question let us remember that the rule against perpetuities relates to the vesting of future interests in property real or personal. It has nothing to do with the time of enjoyment or possession, neither the commencement of it nor the duration of it, nor even whether there ever shall be any possession. For example, a gift to A for a 1,000 years, remainder to B for life, gives B a present vested interest, unaffected by the rule against perpetuities, although it is by no means certain that B will live enough more than a 1,000 years ever to enjoy the possession.[1]

Let us also remember that interests in property real or personal are divisible in a great variety of ways, and that however divided the rule against perpetuities is liable to be violated by the remote vesting of any interest in any part. For example, the property may be divided between several as joint tenants or tenants in common, as individuals or as a class; one may have the legal interest, another the equitable; it may be divided vertically, the east half to A, the west half to B; A may be given the legal interest, B the equitable; A may be given the present interest, B the future; A may be given the dominant interest, B the servient, as if B has the right of possession, A the right of way over it, or to take a profit *à prendre* from it, as to cut wood, dig ore, carry away earth, etc.; it may be sliced horizontally, the surface given to A, the minerals to B; and any of these divisions may be made to endure forever, except the present and future. No matter how it be divided, the rule against perpetuities is concerned only with the division of any of these interests (surface, mineral, dominant, servient, legal, equitable, or the like) into present and future. If there is a possibility, no matter how improbable, that any future interest will vest in right at too remote a time, the provision purporting to create such interest is absolutely void from the beginning. If, on the other hand, the right to such future estate vests at once, or is certain not to vest at too remote a time, the future interest is valid so far as the rule against perpetuities is concerned, though there be no certainty that the future estate will ever come into possession at any time.

To the rule as above stated there is one exception to be noted in this discussion, *viz.*: If the person having the present interest has at all times, and is certain to have at all times, power to destroy such future interest at will, and to convey an absolute estate freed and discharged of such future interest, there is no such public inconvenience as requires a policy of law that such future estate shall be void; and therefore it is allowed to be good, regardless of the remoteness of the vesting of the right; and if at any time it chance to vest before it is actually destroyed, the law allows it to operate. For example, an estate limited to vest at the termination of an estate tail is good because the tenant in tail can always bar it by common recovery.[2]

[1] Gore v. Gore (1722) 2 P. Wms. 28, 24 Eng. Reprint, 629.

[2] Goodwin v. Clark (1661) 1 Lev. 35, 83 Eng. Reprint, 284, 1 Sid. 102, 82 Eng. Reprint, 996, 1 Keble, 73, 78, 169, 247, 462, 83 Eng. Reprint, 819, 822, 880, 926, 1054; Nicholls v. Sheffield (1787) 2 Bro. Ch. 215, 29 Eng. Reprint, 121.

Without attempting to state any further exceptions to the rule, we are now in a position to attempt a statement of it: Every future interest not capable of being destroyed at will at any time by the holder of the present estate in possession is void at its creation if by any possibility it may vest in right at a time more remote from the creation of it than the law of that state permits, which at the common law was lives in being and twenty-one years, but is now generally reduced by statute to the lives of two prior takers and the infancy of the person to take such future estate if he lives to be twenty-one.

The question to be discussed in this article is whether an option to buy property is void by reason of the fact that it may be exercised at a period more remote from the time of its creation than the law of the state permits contingent interests to vest. That such an option is void is a proposition that has received the sanction of the English Court of Appeal;[3] and that decision has been followed by the supreme courts of Pennsylvania and West Virginia, with some attempts to justify it by argument; has been incidentally approved by the supreme judicial court of Massachusetts;[4] and has been stoutly defended by Professor John C. Gray.

On the other hand, so far as I am aware, the proposition has been squarely and positively denied in cases in which it was necessary to decide it, by only two courts of last resort in this country, the supreme court of California and the court of appeals of Maryland.[5] These two decisions, however, do receive some weight by reason of the fact that they were rendered in the face of the cases on the other side, pressed on the court for consideration, and the fact that the last decision was apparently rendered without knowledge that there was any other decision to the same effect.

Any proposition supported by such eminent authority as the English Court of Appeal, the American courts mentioned, and so great a jurist as Professor Gray, in the line of his specialty, is certainly not to be scouted or put aside by a wave of the hand; but with all due deference, it is proposed in this article to show that the proposition is unsound in principle, not reconcilable with the decisions before and since on kindred questions in the courts that affirm it, serves no public necessity, unduly restricts legitimate business, and imperils vast and numerous estates all over the country accepted in the most conventional business transactions on the advice of very eminent counsel, without a suspicion of any such question being involved.

For example, if the proposition be sound, a lease of premises for twenty-four hours beginning at midnight tonight, with the option of purchasing at any time during the term of the lease, violates the rule against perpetuities in all states where there is no gross term of twenty-one years allowed; for there is no infancy involved, and there is no certainty that the life of either party will endure to the end of the twenty-four hours. To state such a proposition would shock the bar, bench, and laity of the whole country; yet there is no escape from it, for the courts that affirm the proposition hold that it is immaterial that the person having the option is to exercise it during the term of his lease.[6] I would like to hear what Lord Chancellor Nottingham would have said to such a rule.

If the proposition we are considering is sound, all options to purchase land in states allowing no gross term are void if not expressly limited to be executed during the life of a living person; yet options not so restricted are taken in business every day, and have always been enforced without question or suspicion that

[3] London & S. W. R. Co. v. Gomm (1890) L. R. 20 Ch. Div. 562, 51 L. J. Ch. N. S. 530, 46 L. T. N. S. 449, 30 Week. Rep. 620.

[4] Barton v. Thaw (1914) 246 Pa. 348, 92 Atl. 312, Ann. Cas. 1916D, 570; Starcher Bros. v. Duty (1907) 61 W. Va. 373, 123 Am. St. Rep. 990, 9 L.R.A.(N.S.) 913, 56 S. E. 527; Woodall v. Bruen (1915) — W. Va. —, 85 S. E. 170; Winsor v. Mills (1892) 157 Mass. 362, 32 N. E. 352; Gray, Rule against Perpetuities, §§ 279 et seq.

[5] Blakeman v. Miller (1902) 136 Cal. 138, 89 Am. St. Rep. 120, 68 Pac. 587; Hollander v. Central Metal & Supply Co. (1908) 109 Md. 131, 71 Atl. 442, 23 L.R.A.(N.S.) 1135.

[6] Woodall v. Clifton [1905] 2 Ch. 257, 74 L. J. Ch. N. S. 555, 54 Week. Rep. 7, 93 L. T. N. S. 257, 21 Times L. R. 581.

the rule against perpetuities was involved. Are these options all void? They serve a useful purpose in our business life, and if there is any vice in them, the remedy is for the legislature, not for the courts, unless they violate an established rule of law.

If the proposition we are considering is sound all mortgages are void in states where a mortgage does not pass the legal title (the rule in most states) and where no gross term of years is allowed (also the rule in most states), unless the time for foreclosure is expressly limited to the life of a named person, which is never done, and in the nature of things cannot be done in any case of a time loan; and in all states the long-time mortgages given to secure bonds on railroads and other public service corporations, and not to mature within twenty-one years from the day of issue, of which there are hundreds of millions now outstanding, are void. The facts that these bonds have been issued after the mortgages have been approved by eminent counsel, and that they are still selling by the million above par in the open market, are proof at least that the objection we are debating is not considered seriously by the legal advisers of people who have invested in these securities. In defense of these securities, Professor Gray suggests that "if he (the mortgagee) has a present right and a present remedy, the fact that he may not choose at once to exercise his remedy, and that therefore a title may not be acquired by a sale under the power till a period beyond the limits of remoteness, no more invalidates the power than it would invalidate a title acquired by a sale under order of court in a foreclosure suit."[7] The fact suggested, of course, does not exist before default, if what Professor Gray means is the right to foreclose at once. What the mortgagee has is merely an option *in case of default* to sue on the bond or note *or* to sell the mortgaged property by virtue of the mortgage. His suggestion does not save the mortgage in the ordinary case; but it is manifest that it does save the ordinary option if it has any force at all. According to this suggestion, if the holder of the option has the right to exercise it at once, the fact that he may choose to postpone action does not invalidate his option, for in that case the option is a present vested right to which the rule against perpetuities has no application; and, being a present vested right, it is wholly immaterial when the actual possession under it will be taken, so far as the rule against perpetuities is concerned. That rule does not concern itself with the time when the possession will arise, but with the time when the right will arise.

Professor Gray suggests that if default under the mortgage might occur at a period later than the rule against perpetuities permits rights to vest, it will be found more difficult to support the right of the mortgagee; and he suggests only three arguments to support it, all of which he admits are unsound: (1) That the mortgagee could at any time release; (2) that the mortgagor could at any time discharge the mortgage by payment, which he manifestly has no right to do before the debt is due; and, (3) that the question relates merely to the remedy, which he says is "only a piece of verbal jugglery to avoid reaching an unwelcome conclusion."[8]

When it was urged in the supreme court of California that a power to the trustee under a trust deed mortgage to sell on default was void because it might be exercised at a time not measured by lives, the court answered the objection by saying: "Our records will disclose the fact that trust deeds have been quite frequently used as security for loans. Their validity has been upheld in numerous cases, beginning very soon after the adoption of the Code, and continuing until the present time. These decisions, which have been uniform, establish a conclusion which has become a rule of property, and however thoroughly we might now be convinced that the rule is erroneous, it should not be disturbed. Doubtless, many people have invested their money relying upon this construction of the law by the highest tribunal of the state, while those who have executed such deeds have done so with the ex-

[7] Gray, Rule against Perpetuities, § 565.

[8] Gray, Rule against Perpetuities, §§ 566-570.

pectation that they would be held valid. Ruin and injustice would result from such a decision as is now sought. If the question as to whether the rule of *stare decisis* shall prevail be one of policy, there is here no balancing of evil done against the good attained. The result would be evil only. It is said that in none of the cases heretofore decided was the point raised. Whether it was or was not may be a matter of argument." [9]

If options which may possibly be exercised at a time more remote from their creation than the law allows estates to vest be, for that reason, void, it follows that all provisions in corporate articles and by-laws giving the corporation the right to retire preferred stock at times not measured by lives or a gross term allowed by law, all provisions declaring the right to the corporation to levy calls and assessments on its stock and forfeit the stock if the calls are not paid, and numerous other regulations of such companies now in common use, and all action taken by virtue of such provisions, are absolutely null and void, because they violate the rule against perpetuities. All of these provisions are mere options. Even the English courts balked at this logical and necessary conclusion from their decisions that unlimited options are void.[10] The court attempted to distinguish this from the former cases, on the ground that the stockholder has only contract rights, and the property belongs to the corporation; but manifestly this is, to use Professor Gray's fine phrase, "only a piece of verbal jugglery to avoid reaching an unwelcome conclusion." In substance corporations are merely legal trusts for the stockholders.

Without further pursuing the course of this doctrine, strewn on every hand with injustice and disaster, serving no good purpose, producing no rewards, let us for a moment return to inquire for the reasons on which it is supposed by those who advocate it to be based. Why is an unlimited option violative of the rule against perpetuities? The reason given is that it is an interest in property which may arise at a period beyond the legal limits. That it is an interest in property may be accepted without debate, and that possession under it may be taken at a time more remote than the legal limits of a perpetuity is confessed. But what of that? The rule is not concerned with the commencement of the possession, but with the vesting of the right. This, therefore, is no objection. But it is said that the right is contingent. Why is it contingent? They say it depends on the exercise of the option. No right arises till the option is exercised, till the holder of the option elects to take the property; that he may never do, or may do at a time beyond legal limits. Good. I would not ask a better reason to refute the doctrine utterly and unanswerably.

If the fact that the person having the present right may elect not to exercise it within the perpetuity limit is a reason to hold the right void, there never was and never can be a valid devise or bequest. Any person to whom any gift is made has his option to accept or reject it; title cannot be forced on anyone by will. "There is no limit in point of time to a right to elect, unless it can be shown that injury would result to third persons by delay." [11] If the person entitled to elect dies before doing so, his heir may elect for him.[12] It is true that in most cases the election will be made very soon, and in most cases also the donee will elect to accept; but the rule against perpetuities does not concern itself with probabilities, but possibilities; if there is

[9] Sacramento Bank v. Alcorn (1898) 121 Cal. 379, 53 Pac. 813. Approved in Staacke v. Bell (1899) 125 Cal. 309, 57 Pac. 1012.

The Sioux City Terminal R. Co. leased its lines and property to the Sioux City & N. R. Co. for a term of 100 years, reserving a rent of $90,000 a year, then executed a trust deed mortgage of its lease and properties to the Trust Company of America to secure bonds for $1,250,000, due in ten years, providing that if default should be made in payment of the rent, interest, or bonds, the trust company might take possession, operate, sell, etc. In suit to foreclose, junior creditors urged that the rule against perpetuities was violated by this arrangement. The court overruled the objection. Sioux City Terminal R. & Warehouse Co. v. Trust Co. of N. A. (1897) 27 C. C. A. 73, 49 U. S. App. 523, 82 Fed. 124.

[10] Borland v. Steel Bros. & Co. [1901] 1 Ch. 279, 70 L. J. Ch. N. S. 51, 49 Week. Rep. 120, 17 Times L. R. 45.

[11] Pom. Eq. Jur. § 513.

[12] Fytche v. Fytche (1868) L. R. 7 Eq. 494, 19 L. T. N. S. 343.

a possibility that the estate will vest at too remote a time, it is void. So far as the rule against perpetuities is concerned every devisee has but an option, and that option may be exercised at a time later than the rule against perpetuities permits estates to vest.

Whiteacre is granted with a right of way over Blackacre to it. The grantor's possession of Blackacre is not disturbed, and there is a possibility that that possession will never be disturbed by an actual use of the way, or not, within lives and twenty-one years. Are all easements void as violating the rule against perpetuities if the donee or grantee has an option not to exercise his right within the perpetuity period?

A sells the minerals under Blackacre to B and his heirs, with an option to B or his heirs at any time to buy the surface at a fixed price. Is the option void? Unquestionably B and his heirs can let the minerals lie in the earth for generations, and then go onto the surface, sink shafts, make roads, dump refuse, and if need be monopolize the surface entirely.[13] He can take it without an option, but not with one; he can take it without paying for it, but cannot buy it under his option. Surely the surface rights are as much infringed at a remote time by the option to mine as by the option to buy.

If land be leased to B and his heirs, reserving to the lessor and his heirs a certain rent with right to take distress if it be not paid, the right to take distress is not void by reason of the fact that it may be taken for the first time at a date more remote than the perpetuity period from the making of the lease. And why? Merely because it is a vested right from the start, and it is immaterial that the occasion for its use may not arise till a late period. And yet certainly this is a mere option to the lessor and his heirs to sue for the rent or levy a distress.

If land be leased for a certain term with a covenant for perpetual renewal, the renewal of the lease can be perpetually enforced according to the covenant, against the lessor, his heirs and assigns, even after the perpetuity period from the creation of the lease has passed. The rule against perpetuities has no application, because it is a present vested right at the creation of the lease.[14] The English House of Lords has enforced such renewals, though the right was dependent on notifying the lessor of election to renew and payment of a fine.[15]

In view of these decisions the Irish courts have held that the doctrine we are discussing did not render void a covenant in a grant in fee reserving perpetual rent, that the grantee or his heirs might against the grantor or his assigns fine down the rent to a peppercorn at any time on payment of a stated sum;[16] but they held that a covenant that the grantee or his heirs might redeem the rent at any time was void in so far as it purported to bind the property.[17] The land was held bound in the one case, and not in the other. The distinction is very thin, —just the thickness of a peppercorn. A rule invented to prevent perpetuities, entails, and fetters on property is thus turned into an instrument whereby perpetual fetters may be fastened on the estate. That is such reasoning as is reasoning because it is reasoning. "Pray let us so resolve cases here, that they may stand with the reason of mankind when they are debated abroad. Shall that be a reason here that is not a reason in any other part of the world?"

Some people have supposed that the doctrine that an unlimited option to repurchase violates the rule against perpetuities is approved by the supreme judicial court of Massachusetts, drawing this inference from the fact that the decision of the English Court of Appeal in London Southwestern R. Co. v. Gomm[18]

[13] Turner v. Reynolds (1854) 23 Pa. 199, 12 Mor. Min. Rep. 190; Dewey v. Great Lakes Coal Co. (1912) 236 Pa. 498, 84 Atl. 913; Fletcher v. Moriarity (1911) 62 Fla. 482, 56 So. 437; Buck v. Walker (1911) 115 Minn. 239, 132 N. W. 205, Ann. Cas. 1912D, 882.

[14] Hare v. Burges (1857) 4 Kay & J. 45, 70 Eng. Reprint, 19; Pollock v. Booth (1875) Ir. Rep. 9 Eq. 229, 607.

[15] Sweet v. Anderson (1772) 2 Bro. P. C. 256, 1 Eng. Reprint, 927.

[16] Re Browne [1911] 1 Ir. R. 205.

[17] Re Donoughmore [1911] 1 Ir. R. 211; overruling Switzer v. Rochford [1906] 1 Ir. R. 399.

[18] (1882) L. R. 20 Ch. Div. 562, 51 L. J. Ch. N. S. 530, 46 L. T. N. S. 449, 30 Week. Rep. 620.

is cited with apparent approval in Winsor v. Mills,[19] but the supposition can scarcely be indulged, for the decision in Winsor v. Mills is clearly right, since the option in that case was not a present option, but one to arise after the perpetuity period, *viz.*, whenever the owners of the property should offer it for sale, if they ever should. How could the Massachusetts courts hold an immediate reserved option void and an unlimited possibility of reverter or of entry for condition broken good, both of which that court has done?[20] That would be saying a grant to A and his heirs till the grantor or his heirs ask for a reconveyance reserves a good estate to the grantor; but a grant to A and his heirs, reserving to the grantor and his heirs a right to repurchase at any time for a stated price, gives A an absolute fee, and the reservation is void. Even in this day of free assaults on the courts, such a disgraceful course of conduct should not be presumed against any court till it has been guilty. The supreme court of West Virginia, which has just affirmed the last proposition, has never yet affirmed the first,[21] thought it might be assumed that it would do so should occasion require, since the court in this case admits it is "committed" to that doctrine, and since no decision by any American court has yet held a possibility of reverter on conditional limitation or on breach of condition subsequent and entry to be governed by the rule against perpetuities. All the cases have held these rights to be vested particles of the conveyed estate, reserved to the grantor, not a contingent interest to arise.[22]

The rule against perpetuities is a rule of public policy, not a matter of form. If a particular disposition can be accomplished by one means it may be done by another means, so far as this rule is concerned. In this connection the language of Lord Chancellor Nottingham in the first gospel of this creed is worthy of note. He said: "All men are agreed (and my Lord Chief Justice told us particularly how) that there is a way in which it might be done, only they do not like this way; and I desire no better argument in the world to maintain my opinion than that; for, says my Lord Chief Justice, suppose it had not been thus: If Thomas die without issue, living Henry, then over to Charles, but thus: If it happen that Thomas die without issue in the life of Henry, etc., then this term shall cease, and there shall a new term arise and be created to vest in Charles in tail; and that had been wonderful well, and my Lord of Arundel's intention might have taken effect for the youngest son. This is such a subtilty as would pose the reason of mankind; for I would have any man living open my understanding so far as to give me a tolerable reason why there may not be as well a new springing trust upon the same term to go to Charles, upon that contingency, as a new springing lease upon the same trust; for the latter doth much more tend to perpetuity than the former, I am bold to say it."[23]

The Irish courts have also held that conditions subsequent are not within the operation of the rule against perpetuities;[24] and while there have been decisions in the lower English courts to the contrary,[25] they are discredited by the decisions of the higher English courts,[26] the opinions of English writers on real property, and the whole history of English real property law. In his

[19] (1892) 157 Mass. 362, 32 N. E. 352.

[20] Tobey v. Moore (1881) 130 Mass. 448; First Universalist Soc. v. Boland (1892) 155 Mass. 171, 29 N. E. 524, 15 L.R.A. 231.

[21] Woodall v. Bruen (1915) — W. Va. —, 85 S. E. 170.

[22] See the Massachusetts cases above cited, and Hopkins v. Grimshaw (1897) 165 U. S. 343, 41 L. ed. 739, 17 Sup. Ct. Rep. 401; Van Rensselaer v. Ball (1859) 19 N. Y. 100; Wakefield v. Van Tassell (1903) 202 Ill. 41, 66 N. E. 830, 95 Am. St. Rep. 207, 65 L.R.A. 511; Palmer v. Union Bank (1892) 17 R. I. 627, 24 Atl. 109. Also assumed in Methodist Protestant Church v. Young (1902) 130 N. C. 8, 40 S. E. 691.

[23] Norfolk's Case (1682) 3 Ch. Cas. 1, 22 Eng. Reprint, 931.

[24] Atty. Gen. v. Cummins [1905] 1 Ir. R. 406.

[25] Dunn v. Flood, L. R. 25 Ch. Div. 629, 53 L. J. Ch. N. S. 537, 49 L. T. N. S. 670, 32 Week. Rep. 197; Re Hollis' Hospital [1899] 2 Ch. 540, 68 L. J. Ch. N. S. 673, 47 Week. Rep. 691, 81 L. T. N. S. 90.

[26] Cooper v. Stuart (1889) L. R. 14 App. Cas. 286, 58 L. J. P. C. N. S. 93, 60 L. T. N. S. 875, in the Privy Council on appeal from New South Wales.

Tenures, Littleton says: "If a man by deed indented enfeoffs another in fee simple, reserving to him and his heirs yearly a certain rent payable at one feast or divers feasts per annum, on condition that if the rent be behind, etc., that it shall be lawful for the feoffor and his heirs into the same lands or tenements to enter, etc., . . . in these cases if the rent be not paid at such time, or before such time limited and specified within the condition comprised in the indenture, then may the feoffor or his heirs enter into such lands or tenements, and them in his former estate to have and to hold, and the feoffee quite to oust thereof." Litt. § 325. Lord Coke said the same thing, *viz.*, "If I enfeoff another of an acre of ground upon condition that if mine heir pay to the feoffee, etc., 20 shillings, that he and his heir shall reenter, this condition is good; and if after my decease my heir pay the 20 shillings, he shall re-enter; . . . and so if a man have a lease for years and demise or grant the same upon condition, etc., and die, his executors or administrators shall enter for the condition broken." Co. Litt. *214b. And to the like effect are the English writers generally since.

So far as the English courts are concerned it is believed that it can fairly be said that the doctrine of London Southwestern R. Co. v. Gomm, if it ever extended farther than the decision in Winsor v. Mills, has been abandoned or restricted within the scope of Winsor v. Mills, by the later cases. When a man selling a strip through his land to a railway reserved the right at any time he desired to construct a tunnel and maintain a passage through this strip under the railway, this was held not to violate the rule against perpetuities, for the reason that "it is not a right to arise at some future time, *it is an immediate right;* the conveyance was made subject to a legal reservation of the easement; in the present case the plaintiffs themselves entered into the contract to grant, and granted the easement of tunneling." [27] Let no one be misled by the fact that the grant was of an easement instead of an absolute estate. An easement to arise at a future time is as vicious as any other future estate. The easement in this case was to arise only when use of it should be desired, which is as future as any present option. To sum up what we have found by this inquiry, it has been shown that the notion that an unlimited option to buy violates the rule against perpetuities is a heresy unsupported by legal history, not capable of being reconciled with the decisions on kindred questions, serves no public necessity, unduly restricts legitimate business, upsets vast and numerous settlements, estates, etc., and should be absolutely and everywhere repudiated.

John P. Wood.

[27] Southeastern R. Co. v. Associated Portland Cement Mfrs. [1900] 1 Ch. 12.

## *Simplification of Real Property Law*

Real property with us does not serve as the foundation for personal distinction or family grandeur, and is invested with no peculiar sanctity. Its uses are those of property simply. It is an article of commerce and its free circulation is encouraged. . . . I do earnestly maintain that it is owing simply to the inertia and conservatism of our bar that it is willing to let this great department of our law remain in its present condition—chaotic, uncertain, complex, and abounding in subtleties and refinements.—Hon. John F. Dillon.

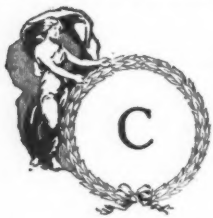
# *Chief Justice Marshall and the American Indian*

*BY PRESTON A. SHINN*

*Of the Pawhuska (Oklahoma) Bar*

[Ed. Note.—Mr. Shinn was for six years connected with the legal department for the Osage tribe of Indians in Oklahoma, during two years of which time he was their General or Tribal Attorney.]

"They assumed the relation with the United States which had before subsisted with Great Britain. This relation was that of a nation claiming and receiving the protection of one more powerful; not that of individuals abandoning their national character and submitting as subjects to the laws of a master."



CHIEF JUSTICE MARSHALL, who wrote the opinion of the court in Worcester v. Georgia, 6 Pet. 515, 8 L. ed. 483, Marshall's Constitutional Opinions, 712, was probably better qualified to speak of the early history of the Indians, their former relationship with Great Britain and her Colonies, as well as their status under the Constitution of the United States, than any other man. The law as interpreted by Justice Marshall in Cherokee Nation v. Georgia, 5 Pet. 1, 8 L. ed. 25, and in the "Worcester" Case, was the corner stone upon which the Congress and the courts have since built their uncompleted structure for the management of the Indians. Had the Congress kept more clearly in mind the words of the great Chief Justice, supra, the American Indian to-day would be much farther advanced in civilization, more self-reliant, happier, and in every way of greater benefit to himself and to the government. True, many of the Indians have substantial weath; but, generally speaking, he and his wealth are handled in such manner as to compel him to rely entirely on his "master" for his guidance in every particular. He is managed to-day under a system adopted by the government nearly a century ago, and which he has, strange to say, considering the handicap, outgrown. That that department of our government having the Indian in charge has his best interests at heart will not be questioned by those who have had an opportunity to observe its work, but because of its great antiquity, its enforced lack of elasticity, its failure to keep abreast of the spirit of congressional legislation, the Indian is paying a penalty unknown to the great mass of thinking men throughout the United States, and to but comparatively few members of Congress. The proper advancement of the Indian service, for the benefit of the Indian, means that within a comparatively short period the Indian Bureau will be whittled down to comparatively but a few employees.

In handling the Indian problem, the Congress is dealing with human souls, and the best and most enlightened methods should be used, to the end that the Indian may become self-reliant and assertive of those rights which will make of him a real beneficiary of modern enlightenment. This can only be done by the appointment of a Congressional Commission to work out an up to date plan for the handling of the Indian-men who will be guided by that same fearless attitude as was the great Chief Justice in leading the court in the "Worcester" Case.

Worcester v. Georgia, upholding the rights of the Cherokees as against the state of Georgia, shook the government to its foundations, but it saved the Indian for the time. The then President is reported to have said of the decision: "Mr. Marshall has made the decision, now let him execute it." Mr. Justice

Story, who was a member of the Supreme Court, and participated in the decision, in a letter to Professor Ticknor, said: "The decision produced a very strong sensation in both Houses; Georgia is full of anger and violence. Probably she will resist the execution of our judgment, and, if she does, I do not believe the President will interfere, unless public opinion among the religious of the eastern, western, and middle states should be brought to bear strong upon him. The rumor is that he has told the Georgians he would do nothing. I, for one, feel quite easy on the subject, be the event what it may. The court has done its duty. Let the nation now do theirs. If we have a government, let its command be obeyed; if we have not, it is well to know it at once, and look to consequences." To his wife Justice Story says: "I confess that I blush for my country when I perceive that such legislation, destructive of all faith and honor towards the Indians, is suffered to pass with the silent approbation of the present government of the United States;" and again: "I never in my whole life was more affected by the consideration that they and all their race are destined to destruction. And I feel, as an American, disgraced by our gross violation of the public faith towards them." Story, Life & Letters, II., 79, 84.

Chief Justice John A. Shauck, speaking of Worcester v. Georgia, says: "Marshall had devoted a third of a century to the duties of his high office when he came to Worcester v. Georgia, the last of his great opinions. The years had brought to his intellectual powers not failure, but fruition. . . . This is not entitled to be considered his greatest opinion, because others involved questions much more vitally affecting the nation. . . . Juridical literature does not suggest another whose resources would have been adequate to the production of this opinion. It is the opinion of the philanthropist, the champion of treaty obligations, the historian of the colonies and of the Revolution, the master of the law among nations, and the father of constitutional interpretation." Note to Marshall's Constitutional Opinions, page 722.

We have able and fearless men in our Congress to-day, and the members of the bar can do no greater favor to the American Indian than to urge for a Commission of Senators and Congressmen, who will work out a modern plan that the Indian may become a real American citizen, and not subject to the laws of a "master," except as all citizens are subject to the law.

Preston A. Shinn

## *Marshall—The Interpreter of the Constitution*

Professor Bryce says of Marshall: "The Constitution seemed not so much to rise under his hands to its full stature, as to be gradually unveiled by him till it stood revealed in the harmonious perfection of the form which its framers had designed. The admirable flexibility and capacity for growth which characterize it beyond all other rigid or supreme constitutions, is largely due to him."

Warren Olney said: "Instead of the Constitution being a rope of sand, as most men at first believed, or an infringement on the liberties of the people, as represented by the states, as many thought, Marshall showed, by lucid reasoning and by the authority of this great judicial tribunal, that the Constitution was a ligament binding us together as a common whole, but yet preserving to the states individual freedom in all local and personal affairs. Changing the simile, we may say in the language of President Garfield: 'Marshall found the Constitution paper, and he made it power; he found it a skeleton and clothed it with flesh and blood.'"

# *Indiana's "Constitutional" Lawyer*

*BY LESLIE CHILDS*

*Of the Indianapolis Bar*

WHENEVER a lawyer gets up to make a speech, on requirements for admission to the bar, be he in Maine or California, Michigan or Florida, he will as a general rule close his remarks by pointing to the lone state of Indiana as the "horrible example." Speeches of this kind are for the most part delivered before bar associations, lawyer's conventions, or law schools, so the false impressions they give are to a certain extent localized, which is something to be thankful for.

The speaker will point with pride to the ever-increasing admission requirements in the various states, speak of the improvement the demanding of an A. B., or at least two years' college work, will effect in the making of the young lawyer, and point out with some heat how the profession is elevated by these stringent requirements.

Then turning his attention for a few brief moments to the deplorable condition in the one outlaw state, poor old Indiana, in the matter of admission requirements, and shaking his head, he will inform his hearers that there is a constitutional provision in said benighted state, that places the one requirement of a good moral character on the aspirant for legal honors.

The innocent bystander on one of these occasions might be led to the conclusion that Indiana, as far as courts were concerned, was a howling wilderness, that legal knowledge was a thing not to be found, that the populace settled their differences by resort to the wager of battle or the knotted club, and the practice of law unknown.

He might also get a vision of the whole state of Hoosierdom being admitted to the bar *en masse*, excepting only the few that were not forthcoming with the "good moral character" credential. He might conclude from this that every second man met in the state of Indiana would be a member of the bar. But do the facts and the legal history of the state warrant this conclusion?

The first surprising fact that stares one in the face, on examining this subject, is, that stringent admission requirements do not appear to be much of a bar to men wishing to enter the practice of law. New York, Illinois, and Washington are fairly representative of the advanced states in admission requirements, and each of the above-named states has more lawyers *per capita* than Indiana. Then take New Jersey, Massachusetts, and Ohio, which are possibly somewhat higher in their requirements, and, strange to say, these states have but a fraction less lawyers *per captia* than Indiana.

The one northern state that seems to have cut her lawyers *per capita* by stringent admission requirements is Pennsylvania, with her one lawyer to each 1,068 persons, while Indiana has one to each 751 of population. But one is led to believe that the character of Pennsylvania's population, *i. e.*, the foreign element, has something to do with this shrinkage in the number of lawyers.

There are a great number of states, particularly in the South, that have quite easy admission requirements, yet there are no greater number of lawyers *per capita* than in Pennsylvania.

From this comparison one is led to the conclusion that rigid admission requirements are not the bar to the many that their advocates would have us believe. But the stickler for severe requirements may reply that the purpose of these requirements is not to bar good men from entering the field of law, but to keep a certain class out or make them

measure to a given standard. In other words, to induce a higher grade of men to enter the field, thus elevating the profession as a whole.

From this point, we might well ask just what is meant by a "higher grade" of men? Does it mean men higher morally, or simply men of greater caliber in legal attainments, because these attributes do not necessarily go hand in hand. Alas, too often the highly educated man falls far short of his ignorant brother in morality, and in many instances in common honesty. Many times book learning proves but the tool for the sharpening of a rogue's wits which makes him more cunning in evading the punishment that his wrongdoing merits.

This being so, we will assume that such expressions as "better men," "higher grade men," etc., mean men of greater learning and proficiency in the law. So, leaving the moral side of the question and turning to the legal phase of it, we get on somewhat safer ground. Though it is indeed a difficult task to make any kind of a just comparison as to the legal attainments of the bars of the various states.

The only conceivable way seems to be, first, by an examination of the standing of their courts of last resort and ascertaining the weight of their adjudications, in comparison with other courts of like dignity; second, by a reading of the reports of the various states and noting cases that show, on their face, that they have been appealed by incompetent practitioners.

Now as to the first, the West Publishing Company, by an actual count of the cases cited by the courts in five volumes of the reports of each state, show that Indiana ranks fifth, being preceded by New York, Massachusetts, Illinois, and California in the order named. It is not disputed that the fact of a state ranking high in a table of this kind may be due to the fact that it happened to be the state where an undue amount of cases of first impression arose. Still, it would indicate that the Indiana courts of last resort have had some fair legal talent adorn their respective benches from time to time. And as the bench is recruited in the main from the native members of the state's bars, it certainly reflects the standing of the bars.

When we examine the second, *i. e.*, the reports of the states, it is not hard to find cases that show too plainly the work of incompetent attorneys. Some of them show at a glance that they should never have been appealed to the higher courts, others are glaring exhibits of the illy prepared attorney. But admitting this, the books fail to show any preponderance of these cases as being recorded in the Indiana reports. In fact, there does not seem to be much to choose between the several states in matters of this kind, as every jurisdiction has its share of these much to be regretted cases.

It is quite true that Indiana has never produced a Marshall, a Shaw, or a Mitchell, but for that matter, neither have some forty odd other states. Judges of this class appear only at long intervals, and it is not likely that their production will depend on the requirements for admission.

One mistake of the advocate of cast-iron admission requirements seems to be an overestimation of the importance of school training. They seem to think that all education comes from that source. But is not the term "education" a relative one, after all? That being so, a man might never have gone to school a day in his life and at that be a better educated man than his brother who had a string of letters following his name as long as Halley's comet.

The idea that the possession of degrees implies an education is as general as it is erroneous. The writer has met degree men from some of the largest universities in the United States washing dishes in San Francisco, working under men who had never even mastered the three r's, and they were not collecting material for a book, either. The fact was they had reached their level.

The writer opines that there are several ways of acquiring an education other than going to school. And in particular does this apply to the kind of an education one needs in preparing himself for the practice of law. To be successful in the law, it seems, a man needs a particular kind of temperament, something that certainly cannot be given a man in

any school, and lacking that native ingredient he is not going to succeed as a lawyer, even though he goes through several colleges and universities. It seems that about 95 per cent of the above-mentioned ingredient is composed of "gumption," sometimes called "horse sense," a commodity that is never demanded as a requisite for the conferring of a degree.

All that has gone before has not been said with the idea of belittling the schools, or of decrying a proper training for the man or woman that essays the practice of law, but has been put forward in support of the contention that Indiana has not suffered by this constitutional provision that admits on proof of a good moral character.

Because to succeed in the law a man must prepare himself. There are two ways,—the school route, by far the easier, or the study at home route. And because of the absence of educational requirements, the student in Indiana is given free choice. And while Indiana has no paper tests, does not insist on a diploma or a course of study of any kind, yet possibly the requirements for the successful practice of law in Indiana are as great as any state in the Union, *i. e.*, that of ability, sometimes called the starvation test. If a man has practised law in Indiana five years, and eaten three meals a day during that time earned from his law practice, you need not hesitate to trust him with your legal business.

At the start it may be a kind of a "free for all," but at the end of a year or two nature performs her work well, and there is the most relentless weeding-out process imaginable.

It is safe to say that the vast majority of the young men entering the law in Indiana now are prepared to do so. And by far the greatest number enter by way of the school route. There are seven law schools within the state, to say nothing of the Indiana boys that attend schools in other states.

These law-school graduates, it is true, have to compete with the "constitutional lawyer" when they enter the arena, and they are certainly better equipped than he at the start. But we find him the "C. L." in many cases holding his own, and when he does so it is certainly the reward of merit.

So, it is hard to see where there has been any real loss to the state or the individual in the working of this system. If the young man chooses either road he has his own salvation to work out, and it's a question of ability anyway, and a case of His Satanic Majesty taking the hindmost.

Leslie C. Childs

## *Future Problems*

The lawyer is undoubtedly again coming into his own. Never were the demands upon him greater. Our society is becoming more and more complex, which means more law and not less law. The lawyer, by tradition and by training, is the expert in affairs. He must adapt old loyalties to new facts; he, above all, must find ways to reconcile order with progress. The problems ahead present to our profession opportunities for great leadership; but correspondingly they call for equipment adequate to the task—fresh thinking, disinterested courage, and vision.—Prof. Felix Frankfurter.

# Editorial Comment

Case and Comment

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## *Criminal Responsibility for Death Caused by Spring Gun*

AN interesting opinion was recently handed down by Judge S. J. Boldrick of the Louisvillle, Kentucky, police court, as to the right of a man to set a spring gun within his own curtilage to prevent the theft of his property. The defendant set a rifle in his coal shed so it would fire when the window was opened. The trap killed a negro, who, it is supposed, attempted to enter the shed for the purpose of stealing coal. The defendant was charged with manslaughter. In considering his right to set the spring gun the court said:

> It appears by the common law he had such a right, and the court of appeals of Kentucky, in the case of Gray v. Combs, 7 J. J. Marsh. 478, 23 Am. Dec. 431, goes even further than the common law and held that where a man has valuable property in a strong warehouse, beyond the curtilage, it was lawful for him to erect a spring gun which could only be made to explode by entering the house. This case is cited with approval in McCelland v. Kay, 14 B. Mon. 103, and seems never to have been questioned.
>
> In the case of Ilott v. Wilkes, 3 Barn. & Ald. 304, 106 Eng. Reprint, 674, it was decided by the court of King's bench that a person might lawfully place a loaded spring gun in an inclosed field to prevent depredations. This case caused the British Parliament to pass the act of 8 Geo. IV. which provides as follows:
>
> "That if any person shall set or place, or cause to be set or placed, any spring gun, mantrap or other engine calculated to destroy human life or inflict grievous bodily harm, with the intent that the same or whereby the same, may destroy or inflict grievous bodily harm upon a trespasser or other person coming in contact therewith, the person so setting or placing or causing to be set or placed, such gun, trap or engine as aforesaid, shall be guilty of a misdemeanor. Provided, that nothing in this act shall be deemed to make a misdemeanor within the meaning thereof, to set or cause to be set, from sunset to sunrise, any spring gun, mantrap or other engine, which shall be set in a dwelling house for the protection thereof."
>
> In Kentucky I find, therefore, that a man may lawfully set a spring gun within his own curtilage to prevent theft, there being no statute upon the subject, and the defendant is entitled to his discharge.

The right to set a mantrap upon one's own property was upheld in United States v. Gilliam, Hayw. & H. 109, Fed. Cas. No. 15,205a, where it was held, upon an indictment for murder, that if the deceased attempted in the nighttime to break and enter a goose house which was within the curtilage, and was killed by a spring gun set there by the owner of the dwelling house, the owner would not be guilty of murder, but that this principle did not apply to the protection of personal property in open fields, or in buildings not within the privilege of the domicil.

So, it was said in Simpson v. State, 59 Ala. 1, 31 Am. Rep. 1, wherein the defendant was indicted for assault with intent to murder, that if an owner, by

means of spring guns or other mischievous engines planted for the prevention of trespass on his premises,—not the dwelling house,—and capable of causing death, or of inflicting great bodily harm, on ordinary trespassers, does cause death, he is guilty of criminal homicide; if the engine is of the character of a deadly weapon, the killing is murder; but if not deadly in its character, and intended only for alarm, or for inflicting slight chastisement, or for detention of the trespasser, there may be no offense, unless it shall inflict a punishment from which death ensues, in which event, the offense will be manslaughter.

In State v. Moore, 31 Conn. 479, 83 Am. Dec. 159, upon an information for maintaining a nuisance, it was remarked that since by statute the breaking and entering of a shop in the nighttime, with intent to steal, is burglary, the owner of a shop, placing spring guns in it for its defense, would be justified if a burglar should be killed by them. The court further observed: "The class of crimes in prevention of which a man may, if necessary, exercise his natural right to repel force by force to the taking of the life of the aggressor, are felonies which are committed by violence and surprise; such as murder, robbery, burglary, arson, etc."

This rule was applied in State v. Marfaudille, 48 Wash. 117, 92 Pac. 939, 15 Ann. Cas. 584, 14 L.R.A.(N.S.) 346, where a landlady who, inspired by curiosity, opened the trunk of a lodger, which contained articles of personal property of small value, and was killed by the discharge of a spring gun, which had been arranged within the trunk. The court held that one has no right to take human life, directly or indirectly, to prevent a mere trespass upon or theft of his property.

## *State Prohibition of Receipt, Possession, or Use of Intoxicating Liquor*

THREE propositions concerning the liquor traffic have been settled by the decision rendered by the Supreme Court of the United States on January 8, 1917, in the case entitled James Clark Distilling Co. v. Western Maryland R. Co. 242 U. S. —, 61 L. ed. —, 37 Sup. Ct. Rep. 180.

First: There is no limitation on Congress in controlling interstate commerce in liquor, except what is found in the Constitution itself.

Second: Any state may, unless limited by its own Constitution, prohibit the liquor traffic and every means used for securing intoxicating liquor as a beverage, even for individual use.

Third: The liquor traffic is in a class by itself, and the exceptional legislation affecting it is justified because of its exceptional character.

The necessity for and purpose of the Webb-Kenyon Act was made manifest by the conditions which obtained in the prohibition states and in dry territory. For half a century prior to 1888 the courts recognized the jurisdiction of the state over interstate shipments of liquor from the time they entered the state, the same as other domestic liquors. This policy was reversed in the case of Bowman v. Chicago & N. W. R. Co. 125 U. S. 500, 31 L. ed. 712, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062, and in the subsequent case of Leisy v. Hardin, 135 U. S. 124, 33 L. ed. 141, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681. In reversing this policy the court predicated its announcement, not upon the inability of Congress to act in the premises, but on the ground that inasmuch as Congress had enacted no law restricting or limiting interstate commerce, it was its desire "that such commerce shall be free and untrammeled." The Wilson Act followed very soon after the decision of Leisy v. Hardin, supra, and the construction placed on the Wilson Act in Rhodes v. Iowa, 170 U. S. 412, 42 L. ed. 1088, 18 Sup. Ct. Rep. 664, started the movement for further congressional action that would enable the states to enforce their laws, notably their police regulations, without infringing upon the right of Congress to regulate commerce.

The text of the Webb-Kenyon Act in abbreviated form is as follows:

The shipment or transportation in any manner or by any means whatsoever of any . . .

intoxicating liquor . . . from one state, . . . to another state . . . which said . . . intoxicating liquors is intended, by any person interested therein, . . . to be received, possessed, or in any manner used, . . . in violation of any law of such state, . . . is hereby prohibited.

The use of the words "received, possessed, or in any manner used, in violation of any law of such state," shows that Congress intended to recognize to the fullest extent whatever valid state laws might be enacted, prohibiting or regulating the receipt, possession, sale, or use in any manner of the liquors mentioned in the act.

The West Virginia law prohibited the manufacture and sale of intoxicating liquors, but permitted the sale of alcohol for medicinal, mechanical, pharmaceutical, scientific, and sacramental purposes. It made the places of delivery in the state the place of sale. It prohibited solicitations made to induce the purchase of liquors and the publication of all circulars, price lists, et cetera, which might tend to stimulate purchases of liquor. It prohibited also the possession and receipt of intoxicating liquor from a common carrier, even though such receipt or possession was for individual use.

The Supreme Court called attention to the fact that President Taft vetoed the Webb-Kenyon Act on the ground that it was unconstitutional, and Attorney General Wickersham had written an opinion that the law was invalid. The court then said that it was conscious of the responsibility which it assumed and the serious character of the action which it was about to take.

The court disposed of the constitutional objection based on individual use as follows:

Whether the general authority includes the right to forbid individual use, we need not consider, since clearly there would be power, an incident to the right to forbid manufacture and sale, to restrict the means by which intoxicants for personal use could be obtained, even if such use was permitted.

The court answered the contention about delegating power in these words:

The argument as to delegation to the states rests upon a mere misconception. It is true the regulation which the Webb-Kenyon Act contains permits state prohibitions to apply to movements of liquor from one state into another, but the will which causes the prohibitions to be applicable is that of Congress, since the application of state prohibitions would cease the instant the act of Congress ceased to apply.

As to uniformity of operation the court said:

So far as uniformity is concerned, there is no question that the Act uniformly applies to the conditions which call its provisions into play,—that its provisions apply to all the states,—so that the question really is a complaint as to the want of uniform existence of things to which the act applies, and not to an absence of uniformity in the act itself.

The court closed its decision with this pronouncement:

The exceptional nature of the subject here regulated is the basis upon which the exceptional power exerted must rest, and affords no ground for any fear that such power may be constitutionally extended to things which it may not, consistently with the guaranties of the Constitution, embrace.

This decision apparently deprives the liquor traffic of any protection under the interstate commerce clause. It establishes the right of the state to prohibit the manufacture, sale, and possession of liquor, and every means by which liquor is secured for individual use. The decision is the most important pronouncement of the court on the liquor question in two decades.

## *Insurable Interest in Crops*

THE decision in Hudson v. Glens Falls Ins. Co. 218 N. Y. 133, 112 N. E. 728, L.R.A.1917A, 482, that one working a farm under a contract for a share of the hay produced beyond the amount necessary to winter the owner's stock has an insurable interest not only in such surplus, but also in the amount necessary for the stock, although the title is to remain in the owner of the farm until a division is made, is of considerable importance in view of the scarcity of authority relating to the question of insurable interest in crops. But one other case dealing with this question has been disclosed. Heald v. Builders' Mut. F. Ins. Co. (1872) 111 Mass. 38.

# Among the New Decisions

Law is nothing but a correct principle drawn from the inspiration of the gods, commanding what is honest, and forbidding the contrary.—Cicero.

**Appeal — from order granting new trial — effect of stipulation for judgment absolute.** That one who has appealed from an order granting a motion for new trial, with a statutory stipulation for judgment absolute in case of affirmance, cannot elect to dismiss his appeal and proceed with the new trial, is held in Bush v. Barksdale, 122 Ark. 262, 183 S. W. 171, which is accompanied in L.R.A.1917A, 111, by an extensive note.

**Assault — taking liberties with woman.** A man is held guilty of assault in the Arkansas case of Moreland v. State, 188 S. W. 1, annotated in L.R.A. 1917A, 140, in taking hold of the arm of a married woman not his wife, against her will, with a request to kiss him, although before her marriage she had consented to be kissed by him.

**Auction — completion of contract by bid.** An offer, without any notice of reservation, to sell real estate at auction, does not, it is held in Freeman v. Poole, 37 R. I. 489, 93 Atl. 786, enable the highest bidder to complete a contract which he can specifically enforce by the mere announcement of his bid, but the owner may reject the offer, or raise the bid through his own agent.

Supplemental decisions on the right to withdraw property from an auction sale after it has been offered are gathered in the note appended to the foregoing case in L.R.A.1917A, 63.

**Bankruptcy — superseding state law — involuntary proceedings against farmers.** That the provisions of the Federal Bankruptcy Act allowing voluntary proceedings in case of the indebtedness of farmers, and denying the right to institute involuntary proceedings against such persons, do not annul state statutes providing for such involuntary proceedings, is held in the Connecticut case of Pitcher v. Standish, 98 Atl. 93, annotated in L.R.A.1917A, 105.

**Banks — payment of check on forged indorsement — liability to payee.** That the payee of a check may recover its proceeds from a bank which cashed it on a forged indorsement and collected it from the drawee, is held in the Colorado case of United States Portland Cement Co. v. United States Nat. Bank, 157 Pac. 202, annotated in L.R.A.1917A, 145.

**Carrier — transfer company — breach of contract as to routing.** Where a transfer company agreed to ship the goods of plaintiff over a certain route, and took from plaintiff a shipping order limiting the liability of the transfer company, and thereafter the transfer company shipped the goods over a

different route to that specified by the shipper, in consequence of which they were burned, it is held in the Oklahoma case of O. K. Transfer & Storage Co. v. Neill, 159 Pac. 272, accompanied with supplemental annotation in L.R.A.1917A, 58, that the transfer company was liable for the value of the goods less the amount recovered from the railroad company, without regard to the limitation of liability in the shipping order.

**Conflict of laws — action for death — where maintainable.** An administrator, it is held in Hanlon v. Leyland, 223 Mass. 438, 111 N. E. 907, annotated in L.R.A.1917A, 34, may maintain an action in the courts of the state of his appointment to recover damages under Lord Campbell's Act for the wrongful death of his intestate, although the death occurred in a foreign jurisdiction where the statute was enacted, and the statute does not provide for the survival to him of any right of the decedent, but gives him a new right of action for the benefit of the next of kin.

**Contract — Statute of Frauds — sufficiency of signature.** The signature of the purchaser to a contract to purchase real estate is held sufficient to satisfy the Statute of Frauds in the Connecticut case of Kilday v. Schancupp, 98 Atl. 335, if the contract is prepared at his instance, and recites that the property is sold to him, although his signature does not appear at the end.

The place of signature, under the Statute of Frauds, is treated in the note appended to the foregoing case in L.R.A. 1917A, 151.

**Corporations — stock — method of transfer.** Shares of stock in a domestic corporation, it is held in the Oklahoma case of Litchfield v. Henson Oil Co. 157 Pac. 137, L.R.A.1917A, 54, are personal property, and may be transferred by indorsement and delivery of the certificate; and where such shares of stock, when issued, provide that they are transferable on the books of the corporation only on surrender of the certificate, such provision is binding upon the corporation, and it cannot reissue such stock without the surrender of the original certificate to a person in whose name they stand on the books of the company, and thereby escape liability to a person who holds such stock by assignment and delivery of the same. Such reissued stock is fraudulent and void as against the rights of the bona fide holder of the original. As pointed out in the note appended to Citizens' Nat. Bank v. State, 45 L.R.A.(N.S.) 1076, it is the general rule that statutes or charter provisions requiring the surrender of certificates of stock, together with a proper assignment thereof or power of attorney attached thereto, before reissuing the stock to another, while primarily for the benefit of the corporation, nevertheless impose upon it the duty to enforce the requirement, and if it fails in this regard and transfers upon its books shares of stock to another without a surrender thereof, and without the consent of the true owner, it is liable to the latter, and he may maintain a suit in equity against it to have the transfer set aside and be restored to his rights as a stockholder. In the note referred to, other remedies are also pointed out which may be pursued by the true owner whose stock has been transferred on the books of the corporation without his consent or the surrender by him of his stock.

**Covenant — restrictive — who may enforce.** Where the owner of a tract of land subdivides it into lots, and makes public a general plan of improvement or development, and executes deeds to the lots, with uniform restrictive covenants, pursuant to the general plan, purchasers may enforce such covenants against each other, it is held in Wright v. Pfrimmer, 99 Neb. 447, 156 N. W. 1060.

The question, who may enforce restrictive covenants or agreements as to the use of property, is treated in the note appended to the foregoing case in L.R.A. 1917A, 323.

**Damages — destruction of building.** That the measure of damages for the loss of a building destroyed by fire is the actual cash value of the building at the time and place of its destruction, is held in the Oklahoma case of Chicago,

R. I. & P. R. Co. v. Galvin, 158 Pac. 1153, annotated in L.R.A.1917A, 365.

**Damages — mental anguish — carrier's liability.** That damages for mental suffering only are not recoverable from a carrier on account of its delay in the delivery of an interstate shipment, is held in Southern Exp. Co. v. Byers, 240 U. S. 612, 60 L. ed. 825, 36 Sup. Ct. Rep. 410, L.R.A.1917A, 197.

**Depreciation — theories — straight line — sinking fund.** The annual depreciation charge of a street railway that had made practically no provision for depreciation was fixed in the Massachusetts Bay State Rate Case, P.U.R. 1916F, 221, by estimating half of the annual depreciation allowance on the straight-line basis and half on the 4 per cent sinking-fund basis, where the company had paid but moderate dividends and the public had the benefit of reduced rates and transfer privileges.

**Domicil — change — moving to secure school advantages.** One does not, it is held in Denny v. Board of Equalization, 134 Tenn. 468, 184 S. W. 14, change his domicil for purposes of taxation who, for the purpose of securing educational facilities for his children, moves into a particular county with the intention of retaining his former domicil and returning to it when the education is finished, unless a farm for permanent residence is purchased elsewhere, although he sells his property in the county from which he moves and purchases a residence in the other.

Cases relating to domicil or residence for taxation, as affected by a purpose to obtain school facilities, are gathered in the note following the foregoing decision in L.R.A.1917A, 285.

**Elections — primary — constitutionality of law.** That a primary election law is not unconstitutional because it is impracticable, unworkable if literally construed, and defective because not providing for all candidates to be nominated, is held in the Texas case of Waples v. Marrast, 184 S. W. 180, which is accompanied by a note in L.R.A. 1917A, 253, on the constitutionality of primary election laws.

**Eminent domain — right of way for private railway.** The development by a private corporation of a tract of timber land is held not a public purpose in the Virginia case of Boyd v. C. L. Ritter Lumber Co. 89 S. E. 273, annotated in L.R.A.1917A, 94, so as to justify the exercise of the right of eminent domain to secure a right of way between the tract and the saw-mill of the owner, although provision is made in the statute for the use of the way by anyone having access to it.

**Fixtures — farm buildings.** Buildings, such as corncribs, cattle sheds, hog sheds, and other customary outhouses, situated upon a farm, are held in the Nebraska case of Roden v. Williams, 158 N. W. 360, L.R.A.1917A, 415, to be of the general class which a prospective buyer inspecting the farm would have a right to assume are part of the freehold. They are not such as to put him upon inquiry in reference thereto, even though he may then know that the farm is occupied by a tenant.

**Highway — congressional grant — acceptance.** In order to constitute an acceptance of the congressional grant of right of way for public highways across public lands, it is held in the North Dakota case of Koloen v. Pilot Mound Twp. 157 N. W. 672, annotated in L.R.A. 1917A, 350, that there must be either user by the public for such a period of time and under such conditions as to establish a highway under the laws of this state, or there must be some positive act or acts on the part of the proper public authorities clearly manifesting an intent to accept such grant with respect to the particular highway in question.

**Injunction — against publication of falsehood.** The publication of political matter in a newspaper cannot be enjoined, it is held in the Nebraska case of Howell v. Bee Pub. Co. 158 N. W. 358, merely because it is false or misleading, such relief being forbidden by the fol-

lowing constitutional provisions: "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty; and in all trials for libel, both civil and criminal, the truth, when published with good motives, and for justifiable ends, shall be sufficient defense."

The right of an injunction against a nonlibelous publication affecting personal or political rights is considered in the note accompanying the foregoing case in L.R.A.1917A, 160.

**Insurance — disappearance — suspension — validity of by-law.** A by-law suspending members of a mutual benefit society who disappear is held reasonable in Royal Arcanum v. Vitzthum, 128 Md. 523, 97 Atl. 523, annotated in L.R.A. 1917A, 179, so as to be binding upon a member who agreed to be bound by by-laws subsequently passed, and therefore, in case of suspension for disappearance, no recovery can be had on the certificate.

So, a by-law of a mutual benefit society, suspending a member who disappears, is held reasonable, so as to be within the operation of a provision in the certificate requiring members to conform to rules subsequently adopted in the Illinois case of Apitz v. Supreme Lodge, K. L. H. 113 N. E. 63, L.R.A. 1917A, 183.

**Insurance — insanity — effect.** The insanity of an insured at the time of the loss, continued thereafter during the limitation period prescribed by the policy for commencement of an action thereon, is held in the West Virginia case of Houseman v. Home Ins. Co. 88 S. E. 1048, annotated in L.R.A.1917A, 299, to exempt compliance with the condition regarding proofs of loss.

**Insurance — on property held in common — sale by one tenant — effect.** Insurance on property held in common is held not avoided, in the Arkansas case of Firemen's Ins. Co. v. Larey, 188 S. W. 7, L.R.A.1917A, 29, as to one tenant in common by a sale of the interest of the other tenant, under a clause in the policy making it void if any change takes place in the interest, title, or possession of the subject of insurance.

**Jury — infringement of right — non-unanimous verdict — action under Federal statute.** The requirement of U. S. Const., 7th Amend., that trial by jury be according to the course of the common law, *i. e.*, by a unanimous verdict, is held not to control the state courts, in Minneapolis & St. L. R. Co. v. Bombolis, 241 U. S. 211, 60 L. ed. 961, 36 Sup. Ct. Rep. 595, even when enforcing rights under a Federal statute like the Employers' Liability Act of April 22, 1908, and such courts may, therefore, give effect in actions under that statute to a local practice permitting a less than unanimous verdict.

Recent cases as to the constitutionality of a verdict by less than all the jurors are appended to the decision in L.R.A. 1917A, 86, the earlier adjudications having been presented in 24 L.R.A. 272.

**Landlord and tenant — assignment of reversion — action on covenant.** The assignee of a lessor of land for an amusement park, although not named in a covenant binding the lessor, his heirs, or personal representatives, to pay, at the termination of the lease, for improvements erected on the property, is held bound thereby in Purvis v. Shuman, 273 Ill. 286, 112 N. E. 679, under a statute giving the lessee the same remedies against the assignees of the lessor for breach of any agreement in the lease as he might have had against the lessor.

Supplemental cases on the necessity of the use of the word "assigns" to make a covenant as to a thing not *in esse* run with the land are appended to the foregoing decision in L.R.A.1917A, 121.

**Master and servant — automobile instructor — negligence of pupil — liability.** One conducting a school for instruction in automobile driving for pay is held liable, in the California case of Easton v. United Trade School Contracting Co. 159 Pac. 597, annotated in L.R.A.1917A, 394, for injuries done to a traveler on a highway through the incompetence of a pupil whom one of his teachers intrusts with the management of a car.

**Mines — oil and gas lease — duty to develop.** In an oil and gas lease, creating a specific term, imposing an alternative duty upon the lessee to drill a well within a specified period or pay a stipulated rental for delay, and providing for like postponement of development through successive periods within the term, there is held to be no implied covenant for diligent operation merely to make the lease profitable to the lessor in the West Virginia case of Carper v. United Fuel Gas Co. 89 S. E. 12, annotated in L.R.A.1917A, 171. The delay rentals provided for are deemed to be full satisfaction and compensation for postponement of operation.

**Municipal corporation — injury in park — liability.** The maintenance of a zoölogical garden in a public park by a city is a "governmental function," and the city is held not liable in damages, in the Kansas case of Hibbard v. Wichita, 159 Pac. 399, L.R.A.1917A, 399, for injuries inflicted on visitors by animals through the negligence of the city officers or agents in not properly confining the animals.

**Municipal corporation — power to prohibit keeping of liquor.** Municipal authority to regulate, prohibit, or license the selling of intoxicating liquor is held in Cortland v. Larson, 273 Ill. 602, 113 N. E. 51, L.R.A.1917A, 314, not to include power to forbid the maintaining of clubrooms where such liquor is kept for private use, or the use of liquor therein.

Nor does the police power of a municipal corporation extend to forbidding the keeping of intoxicating liquor by members of clubs in their lockers, for their individual use.

And municipal authority to declare what shall be a nuisance, and prevent and remove the same, does not include power to declare the keeping of intoxicating liquor in the lockers of private clubs, for the individual use of members, to be a nuisance.

**Negligence — intoxication — excuse.** If one voluntarily drinks liquor until he is intoxicated, and so negligently operates an automobile as to cause injury to another, his intoxication, it is held in the Georgia case of Powell v. Berry, 89 S. E. 753, annotated in L.R.A.1917A, 306, will furnish no excuse for his negligence or its proximate results.

**Office — incompatibility — mayor and judge.** The acceptance by the mayor of a city of the office of judge of the police court is held *ipso facto* to vacate the office of mayor, in Howard v. Harrington, 114 Me. 443, 96 Atl. 769, where, under the statutes, the mayor is charged with the duty of prosecuting certain offenses before the police judge.

Incompatibility of offices at common law is considered in the note accompanying this decision in L.R.A.1917A, 211.

**Office — statutory prohibition of two — mail carrier.** A Federal rural mail carrier is held in Groves v. Barden, 169 N. C. 8, 84 S. E. 1042, to be a public officer within the operation of a statute imposing a penalty upon the holder of any office or place of trust or profit who shall undertake to hold any other office or place of trust or profit, and he therefore becomes subject to such penalty if he undertakes to act as constable.

Constitutional or statutory provisions against holding two offices are considered in the note appended to the foregoing decision in L.R.A.1917A, 228.

**Psychology of handwriting — unconsciousness of habit.** Andrew J. Macky, a banker of Boulder, Colorado, at his death left several hundred thousand dollars to the University of Colorado, situated at that place. This welcome bequest was utilized by the University in the building of a beautiful Administration Building. Some time after Mr. Macky's death May Oles brought an action on an alleged contract received by mail from an unknown sender, purporting to be a contract of adoption between her father and Andrew J. Macky, by which she was to receive one third of Macky's estate at his death.

May Oles had actually lived in the family of Macky for some years, and many residents of Boulder sympathized with her in her claim. The vice president of the bank of which Andrew J.

Macky was president testified that, in his opinion, the contract was actually signed by Macky.

After the case had been on trial for five days in the district court at Boulder, the author of "Osborn on Questioned Documents" (Lawyers Co-op. Pub. Co. 1910) was called as a witness, and the next morning the counsel of record for the claimant, instead of cross-examining the witness, arose in open court and said in part:

"I have felt all the way through the justness of the cause until yesterday afternoon, when the scientific expert, through the magnifying glass, showed the condition of this contract. I felt at that time—and there arose in my mind a serious doubt as to the genuineness of that document. That was the first time that I had any doubt. I felt then that possibly an imposition had been practised upon me. I don't propose to practise an imposition upon this court or upon any other person. I therefore ask at this time for a dismissal of the case, or a judgment be entered that will end the case."

Following this sensational ending, May Oles was indicted and tried for forgery and acquitted, and an attempt was then made to open the civil case, the contention being that certain changes or "pencilings" had been put upon the document *after it was offered in evidence.* This case (Oles v. Wilson) has just been decided by Judge Strong (Colorado district court, December, 1916), and in his opinion in which he declined to open the civil case, he discusses the subject of handwriting identification as follows:

"When, as here, there is a large field of admittedly genuine writing to compare with a large field of questioned writing, one can gain many items of more or less characteristic habit and observe any discrepancies and similarities in the questioned writing, and these tests can be increased according to the time and energy consumed in making them. Some are visible at a glance. Others will escape casual observation. Still others will escape careful observation, and may appear as if by chance or accident with startling force because so characteristic and so long overlooked. This illustrates how true it is that one does not know his own handwriting as to its details without a very long study of it, if ever completely. The reason doubtless is that so much of it is unconsciously performed by reflex action that the intellect will never appreciate and never has wholly observed nor can ever fully observe. All the more difficult must it be to make a good imitation of another's writing, when the imitator has to appreciate with the intelligence upon observation all the characteristics of the imitated writing and reproduce them, and fully appreciate with that intelligence all of his own writing characteristics that diverge from those to be imitated and exclude them from the process. . . ."

**Release — of claim for death — effect as to person not joint tort-feasor.** That a settlement of an action against one person for an injury causing death will bar an action against another for the same death, although the defendants in the respective actions were not joint tort-feasors, is held in state use of Cox v. Maryland Electric R. Co. 126 Md. 300, 95 Atl. 43. The note following this case in L.R.A.1917A, 270, treats of release of one of two or more persons severally, but not jointly, liable for a tort, as affecting the liability of the others.

**Return — imprudent investment — where financial results are not promising.** The fact that financial results are not promising does not render an investment in new territory imprudent within the rule that a utility will be entitled to earn a return upon capital only that has been "prudently" invested, is held in the Massachusetts Bay State Rate Case, P.U.R.1916F, 221; since it is the use of capital in establishing or carrying out an enterprise on a greater scale than warranted by conditions, or the use of capital in a wasteful or foolish way, that renders the investment imprudent, rather than the risk of capital in an enterprise economically built.

**Service — discontinuance — street railway — consideration of contract to furnish service.** The West Virginia Commission has authority, it is held in the West Virginia case of Re Charleston Interurban R. Co. P.U.R.1916F, 338, in passing upon the propriety of the abandonment of a street car line and the substitution of motor bus service therefor, to take into consideration a contract of the street railway's lessor to give service in exchange for a right of way, and implied contracts to render service to lot owners along the line who bought from a land company owned and controlled by the owners of the street railway.

So, a street railway seeking authority to discontinue service on a line on which it has agreed to furnish service has the burden of showing that it cannot perform the obligation of the contract consistently with its duties to the public, or that continuation thereof has become burdensome, oppressive, or otherwise inequitable.

And that a particular line of a street railway system is unprofitable is not in itself sufficient to justify discontinuance of service thereon where the system as a whole is profitable.

**Tax — exemption — pasteurizing milk.** Collecting, pasteurizing, and selling milk is held not to be within a tax exemption as a manufacturing process, in People ex rel. Empire State Dairy Co. v. Sohmer, 218 N. Y. 199, 112 N. E. 755, which is accompanied in L.R.A. 1917A, 48, by a note on modification of food products as manufacturing within tax exemption provisions.

**Valuation — working capital — street railways.** That a street railway may be allowed a substantial working capital including stores and supplies is held in the Massachusetts Bay State Rate Case, P.U.R.1916F, 221, although it collects its income from day to day.

And a utility is not entitled to an allowance for the appreciation of land in a valuation for rate making.

**War — sale of property — effect.** By agreement between General Villa, whose forces were in actual possession of the district in Mexico, and the citizens, a war contribution was assessed by commissions appointed by the taxpayers. One who was assessed failed to pay, and property belonging to him was seized by virtue of a general order and sold. It is held in O'Neill v. Central Leather Co. 87 N. J. L. 552, 94 Atl. 789, that the title passed by that sale is not open to inquiry in our courts.

Litigation arising out of the Mexican revolution is the subject of the note appended to the foregoing case in L.R.A. 1917A, 276.

**Will — condition against marriage — specified individual.** A provision in a will directing that the share of a child of testator shall be held in trust, and the income only paid to her until the death of a specified individual, if she marries him, or remains unmarried, is held not void as against public policy in Oakley v. Seaman, 218 N. Y. 77, 112 N. E. 576, which is accompanied in L.R.A.1917A, 40, by a note on the validity and construction of conditions in restraint of marriage with a certain person or a particular class of persons.

**Witness — transactions with persons since deceased — wife of plaintiff.** A woman, it is held in Helsabeck v. Doub, 167 N. C. 205, 83 S. E. 241, is not rendered incompetent to testify in an action by her husband to recover for services rendered to a person since deceased, by a statute making one incompetent to testify as to a transaction with a person since deceased if he is interested in the event.

The competency as a witness of the husband or wife of a party to an action involving a decedent's estate is treated in an extensive note appended to the foregoing case in L.R.A.1917A, 1.

## *Recent English and Canadian Decisions*

[Note.—The more important of these decisions will be reported, with full annotations, in British Ruling Cases.]

**Corporations — transfer of shares — omission of transferee to register — right as against subsequent pledgee.** That the transferee of shares in a corporation who has neglected to have the transfer registered is not for that reason estopped to set up title thereto as against one to whom the transferrer, who in some way had possession of the shares, had pledged them as security, but that the case is one for the application of the rule that where conflicting equities are

equal the one which is prior in time will prevail, is held in Coleman v. London County & W. Bank [1916] 2 Ch. 353, 85 L. J. Ch. N. S. 652.

**Master and servant — liability of master for negligence of servant — scope of employment.** It is competent for a jury to find one who was employed on commission to sell and deliver goods for a company, without, so far as appears, being bound to give any specified time thereto, and who in doing so is bound to use a horse and vehicle owned by an agent of the company, paying hire for its use, was acting within the scope of his employment while driving back to the stables after the day's work was done, so as to render the company liable for his negligence,—according to a decision of the Ontario Appellate Division in Duffield v. Peers, 37 Ont. L. Rep. 652, 32 D. L. R. 339.

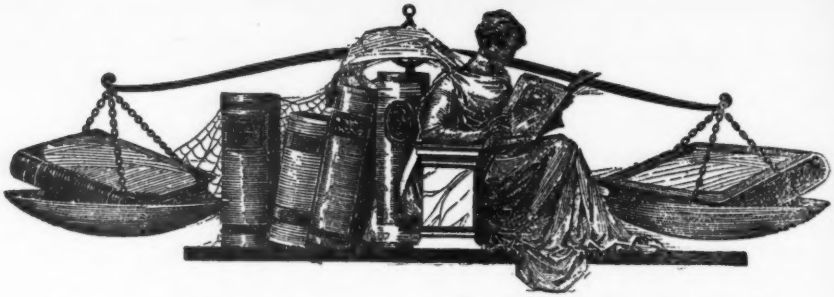
**Municipal corporations — construction of sewer — interference with gas main — liability.** That under a statute providing that where land is expropriated by a municipal corporation for its purposes, or is injuriously affected by the exercise of its statutory powers, compensation is to be made to the owner, and defining the word "land" as including a right or interest in and an easement over land, a municipal corporation is chargeable with the expense of lowering a gas main laid in its streets, occasioned by the construction of a sewer therein by it, is held in Toronto v. Consumers' Gas Co. [1916] 2 A. C. 318.

**Railroads — duty to maintain overhead highway bridge — strengthening for heavier traffic.** That the obligation imposed on a railway company to maintain a highway bridge over its line, by a statute which fixes no standard of strength, is limited to a maintenance in the same condition as to strength in relation to traffic in which it was at the date of completion, and does not render it liable to improve or strengthen the bridge so as to render it sufficient to bear the ordinary traffic which may reasonably be expected to pass over it according to the standard of the present day, is held by the House of Lords in Atty. Gen. v. Great Northern R. Co. [1916] 2 A. C. 356, 85 L. J. Ch. N. S. 717, 32 Times L. R. 674, Lord Haldane, however, dissenting.

**Shipping — impossibility of completing voyage — discharge of cargo at intermediate port — freight pro rata.** A British shipowner who agreed to carry goods to a German port, but who, in consequence of the breaking out of war, making completion of the voyage illegal and impossible, discharged the cargo at a British port, is not entitled to the freight, either in whole, since he did not complete the voyage, or in part, since no new contract between the shipowners and the owners of the cargo to give and take delivery at the British port instead of at the German port can be inferred. St. Enoch Shipping Co. v. Phosphate Min. Co. [1916] 2 K. B. 624.

**War — capture and seizure — neutral carrying contraband — condemnation of vessel.** That apart from the provisions of art. 40, of the Declaration of London, 1909, the attitude and action of the chief maritime state before and since the International Naval Conference of 1908–1909 justify the prize court in accepting as part of the law of nations the rule that "a vessel carrying contrabands may be condemned if the contraband, reckoned either by value, weight, volume, or freight, forms more than half the cargo," and that where such a proportion of contraband is being carried it is not necessary to prove knowledge on the part of the master or owner that the cargo is destined for the enemy,—is held in The Hakan, L. R. [1916] Prob. 266, 85 L. J. Prob. N. S. 231, [1916] W. N. 285.

**War — effect on lease to alien enemy — liability for rent accruing after outbreak of war.** Where the lessee under a lease made before the outbreak of war becomes an alien enemy on the outbreak of war, his covenant in the lease to pay the rent is not thereby suspended or extinguished, and he may be sued for the rent that accrues due during the war. Halsey v. Lowenfeld [1916] 2 K. B. 707.



# New Books and Periodicals

A good book praises itself.—German Proverb.

**"The Life of John Marshall."** By Albert J. Beveridge (Houghton, Mifflin Co., Boston) 2 vols., $8 net.

"The Life of John Marshall," by former Senator Beveridge, is one of the finest contributions to American biography in a generation. From a wealth of material, widely gathered, he has prepared a vivid and brilliant description of the career of America's foremost jurist. The two volumes issued complete the life story down to the time of Marshall's appointment to the chief justiceship. His epochal labors on the bench will be described hereafter in a final part.

The influences which shaped the mind of this great man are recorded in pages of absorbing narrative. The environment of early years, his services as a soldier of the Revolution, his education and law beginnings, his legislative and diplomatic experiences, and his standing at the bar before his elevation to the Supreme Court, present the varied phases of a career possible only under the conditions prevalent in this country more than a century ago.

The work is full of color and incident, yet based on documentary and historical evidence, to which reference is made in the numerous footnotes.

The lawyer who has not perused this biography has a treat in store.

**"Treatise on American and English Workmen's Compensation Laws."** By Arthur B. Honnold (Vernon Law Book Co., Kansas City, Mo.) 2 vols., $15.

A study of the new compensation laws has become a matter of urgent necessity for all attorneys. Within the last few years Congress and the legislatures of thirty-two states have enacted laws on this subject, and the number of cases decided by the various commissions is increasing rapidly. Nearly all those seeking compensation are represented by counsel. Here is a broad field for professional service.

Sufficient time has now passed to fix the underlying principles of this new system, and Mr. Honnold's accurate and comprehensive treatise will be welcomed by the bar. His work refers to all material English and American cases and opinions, and gives the text of the laws of the several states and the Federal law for purposes of comparison. These statutes are specifically referred to in the text, in the discussions of the various provisions of the statutes.

The index is elaborate and covers the express provisions of the several laws and the decisions construing them. Thousands of "fact references" referring to particular adjudicated cases are given, and there is a table of cases cited.

The author is to be congratulated upon the ability and thoroughness with which he has treated his subject.

**"Criminal Code and Digest of North Carolina."** By Edward C. Jerome and Thomas J. Jerome (The Harrison Co., Atlanta, Ga.) Fourth Edition.

In this new edition, the writers of this standard work have added to its value and made it a complete guide to the criminal law of the state. The criminal statutes included in the Revisal of 1905 have been classified under appropriate titles. The text of each section of the Code is accompanied by a reference disclosing its legislative origin, and is further accompanied by citations of decisions in the state reports pertaining thereto. These citations are accompanied by brief digest propositions disclosing the precise holding of the case. The addition of the Southeastern citations is a new feature of this edition. A table of cases and index complete the volume.

**"Justice to All: The Story of the Pennsylvania State Police."** By Katherine Mayo (G. P. Putnam's Sons, New York) $2.50.

This volume, with an introduction by Theodore Roosevelt, is a vivid narrative of the achievements of a remarkable organization. It presents in an accurate and interesting manner the history of the Pennsylvania mounted police, and shows how, in a few years' time, they have established law and order in rural

portions of the state theretofore filled with terror by the criminal acts of a vicious element.

"No political influence or other influence," states Mr. Roosevelt, "avails to get a single undesirable man on the force, or to keep a man on the force who has proved himself unfit. I am informed, and I fully believe, that not a single appointment has ever been made for political reasons. The efficiency with which the force does its duty is extraordinary. Any man who sees the troopers patrolling the country can tell, from the very look of the men, what invaluable allies they are to the cause of law and order."

The reader will find many incidents in this book which rival in interest the most stirring fiction. It is an epic of dutiful men attracted to the "beauty of an austere and selfless ideal," and ready "to die, if need be, for simple love of the Finest Thing in the World."

**"Accidental Means."** By Martin P. Cornelius (C. C. Hines Sons Co., 100 William St., New York) $3.12 postpaid.

This volume is a brief brought down to date, on the insuring clause of personal accident policies. It was originally prepared to be used as a working tool by the author, who is assistant general attorney of the Continental Casualty Company, and by his associates.

The brief is limited to a consideration of the reported cases so far as they bear upon the construction and interpretation of the insuring clause of an accident policy. The many exceptions to the insuring clause have not been considered. Practically all the reported decisions in the United States, bearing upon the precise liability of accident companies under the insuring clause of their policies, have been discussed and classified in this able brief, which is believed to be the only work dealing exhaustively with the questions considered.

**"Income Tax Procedure, 1917."** By Robert H. Montgomery (The Ronald Press Co., 20 Vesey St., New York) $2.50 postpaid.

This is a volume replete with practical suggestions as to what is taxable, what is net income, and what is exempt under the Income Tax Law. It is not a treatise, history, or digest based on income tax legislation, or a compendium of Treasury Department regulations. It aims rather to answer the numerous questions that arise in the preparation of returns, and it is believed that practically all such questions may be solved by a reference to the pages of this work.

Accountants, corporation officials, and individual taxpayers will find Mr. Montgomery's book to be of great service. It interprets the obscure points of the law. Treasury Department regulations and decisions are fully discussed. There are copious extracts from court decisions and accounting practice, where such regulations and decisions do not appear to be in accordance with the intention of Congress as expressed in the law.

On doubtful points of the law in particular, this new book of Mr. Montgomery's should be carefully studied by taxpayers.

**"Reasonableness and Legal Right of the Minimum Charge in Public Utility Services."** By Samuel S. Wyer (American Gas Institute, 29 West 39th St., New York) $1.

Mr. Samuel S. Wyer, consulting engineer of Columbus, Ohio, has prepared a compilation showing the use of the "minimum charge" in public utility rate schedules, and has presented in a forceful and logical manner the arguments in favor of the "minimum charge."

This makes a most readable booklet of some eighty pages, 6" x 9" and contains two alphabetical tables, showing the adjudicated and nonadjudicated monetary allowances for minimum charges in existing rate schedules.

To attorneys for public utility corporations and those engaged in Commission work, the data contained in Mr. Wyer's paper are invaluable. It is the most up-to-date, authoritative information on the subject to-day.

**Morse, Banks & Banking,** 2 vols. 5th ed. $15.00.

**Chapin on Torts, Hornbook Series,** $3.75.

**Chapin, Cases on Torts, Hornbook Case Series,** $2.50.

**Morrison, Mining Rights,** 15th ed. $4.50.

**Bradbury, Workmen's Compensation Law,** 3d ed. $10.00.

**Rightmire, Cases and Reading on the Jurisdiction and Procedure of the Federal Courts,** $6.00.

# Recent Articles of Interest to Lawyers.

**Attainder.**

"The Attaint II."—15 Michigan Law Review, 127.

**Attorneys.**

"Safety First, for the Layman."—23 Case and Comment, 755.

**Claims.**

"Claims Against the United States."—23 Case and Comment, 730.

**Constitutional Law.**

"Ex Post Facto Laws."—5 Kentucky Law Journal, 24.

"Field's Opinions on Constitutional Law."—5 California Law Review, 108.

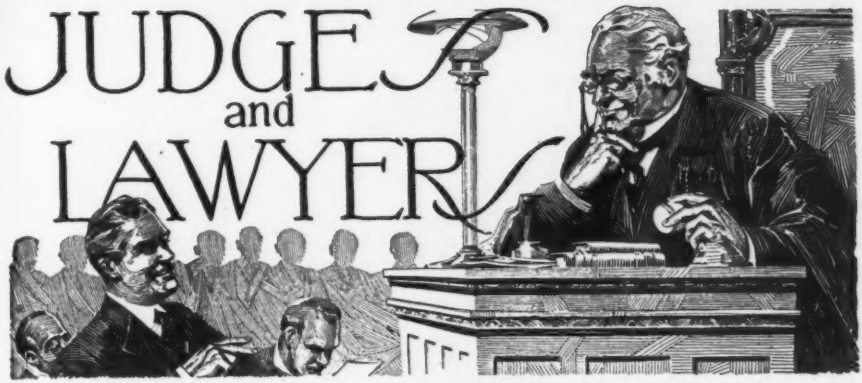
**Contracts.**

"Offer and Acceptance, and Some of the Resulting Legal Relations."—26 Yale Law Journal, 169.

**Corporations.**
"Legal Possibilities of Federal Railroad Incorporation."—26 Yale Law Journal, 207.
**Criminal Law.**
"The Criminal Code of Pennsylvania."—65 University of Pennsylvania, 232.
**Damages.**
"Consequential Damages in Eminent Domain in Pennsylvania."—65 University of Pennsylvania, 258.
**Descent.**
"Probating Indian Estates."—23 Case and Comment, 727.
**Field.**
"Field's Opinions on Constitutional Law."—5 California Law Review, 108.
"Field's Work as a Lawyer and Judge in California."—5 California Law Review, 87.
**Incompetent Person.**
"Liability for Consequences of Permitting an Insane Person to go at large—Case of First Impression."—58 Legal Adviser, 11.
**Indians.**
"In Governing the Indian, Use the Indian."—23 Case and Comment, 722.
"The Civic and Governmental Ideals of the Iroquois Confederacy."—23 Case and Comment, 717.
"The Indian—Case and Comment."—23 Case and Comment, 712.
"Tribal Law of the American Indian."—23 Case and Comment, 735.
"Turning the Indian Loose."—23 Case and Comment, 739.
"Uncle Sam—The Great White Father."—23 Case and Comment, 703.
**Interstate Commerce Commission.**
"Has a Shipper Who Has Been Denied Relief By the Interstate Commerce Commission Any Remedy?"—17 Columbia Law Review, 34.
**Law and Jurisprudence.**
"Judges and Extra Judicial Duties."—52 Canada Law Journal, 421.
**Law Reform.**
"Legislative Failure and Reform."—5 California Law Review, 129.
**Limitation of Actions.**
"Redemption Actions and the Statute of Limitations."—52 Canada Law Journal, 414.
**Lincoln.**
"Lincoln: Man and American."—The Fra, February, 1917, p. 155.
**Magna Carta.**
"The Influence of Magna Carta on American Constitutional Development."—17 Columbia Law Review, 1.
**Martial Law.**
"Martial Law and the English Constitution."—15 Michigan Law Review, 93.
**Master and Servant.**
"The Dangerous Instrument Doctrine."—26 Yale Law Journal, 224.
**Mortgages.**
"Redemption Actions and the Statute of Limitations."—52 Canada Law Journal, 414.
**Practice and Procedure.**
"Uniform Federal Procedure."—84 Central Law Journal, 5.
**Public Lands.**
"Rights of Indians on Public Lands."—23 Case and Comment, 743.
**Railroads.**
"Legal Possibilities of Federal Railroad Incorporation."—26 Yale Law Journal, 207.
**Real Property.**
"Uncertainties in the Law of Vested Remainders."—11 Bench and Bar, 287.
**Statutes.**
"Interesting Laws of Early New York."—23 Case and Comment, 749.
"The Interpretation of Statutes."—65 University of Pennsylvania Law Review, 207.
**United States.**
"Claims Against the United States."—23 Case and Comment, 730.
"The Next Four Years."—Everybody's Magazine, February, 1917, p. 129.
**War.**
"Confessions of a War Correspondent."—Everybody's Magazine, February, 1917, p. 168.
**Waters.**
"The California Water Right."—5 California Law Review, 142.

## *America's First Book*

**What was the first book printed on the American continent? According to one account, at least, it was a work which appeared in Mexico City in 1536. In Seville, Spain, Jules Cromberger had a printing establishment, and he decided that it would be a profitable venture to move to the New World. He sent over a printing-press in charge of Juan Pablos. This was the first press in America, and the year after its arrival the first book was printed. It was in Spanish, the title being "A Spiritual Ladder for Reaching Heaven."**
**—The Outlook.**




A Record of Bench and Bar

# *Col. William A. Henderson*

## *General Solicitor of the Southern Railway Company*

*BY THOS. H. DANIEL*

PROBABLY the time is long past in the entire English-speaking world when a man—or a woman either, for that matter—could gain admission to the bar merely by the readiness of his wit and the suavity of his manner when called upon by a solemn judge to answer questions by oral examination. Yet there is in Washington a lawyer who links the present period of stringent requirements for admission with a past age when those requirements were far less onerous. He was admitted to practise in one state because, as the examining judge expressed it, he "could not do any harm, and might make good." Later, when, because of his participation in the war, it became impossible for him to practise in his native state, he removed to a neighboring commonwealth, where he was admitted to practise because he made a bright and deferential answer to the first question put to him by the examining judge.

The lawyer in question is Colonel William A. Henderson, General Solicitor of the Southern Railway Company, formerly of Knoxville, Tennessee. After a long and active career in the practice of his profession, during which he has gained a wide reputation throughout the South, Colonel Henderson is spending his old age in Washington. He still maintains his office in the big building on Pennsylvania avenue which houses the hundreds of Southern Railway employees, though his duties are far less burdensome than they were a few years ago. He was nearly sixty years old when his principal client, the railway company, was organized, and now, when the road has just passed its twenty-second birthday, its leading counsel has celebrated his eightieth.

Friends congratulated Colonel Henderson upon having attained the age of eighty, and the occasion developed into an informal celebration, one of the most interesting features of which was his relation of the circumstances surrounding his admission to the bar in Tennessee and later in Alabama.

"When I was graduated from the University of Tennessee, in 1856," said Colonel Henderson, "lawyers in that state who had not been graduated from the Lebanon Law School found it necessary, in order to obtain license to practise, to satisfy two judges of their fitness to undertake the practice of the law. While I was at school, I read law at

night for about a year, and afterwards was invited to enter the office, as an employee, of Messrs. Sneed & Cocke, a leading firm of Knoxville. After being there about a year, within which time I had become familiar with the business as it passed through the office, a court came on at Maynardville, in Union county, to be held by Judge T. W. Turley, a brother-in-law of Mr. Cocke. It was desired by Mr. Cocke that I should go to that court to represent him, since he found it inconvenient to go just at that time. But I was not a licensed lawyer. I went to see Judge George Brown and explained the matter to him, in order to have him give me an examination and sign my commission, or license. He signed it without examining me, because, as he said, that could be done by Judge Turley at Maynardville, before whom I was to make by appearance. I went to Maynardville, and presented the situation to Judge Turley. He saw that my license was signed by Judge Brown, and remarked that if the matter was satisfactory to Mr. Cocke and Judge Brown, he would sign the license without examination, as I could not do any harm, and might make good.

Col. W A. Henderson

"That was in 1860. I proceeded as best I could until it was determined, with the consent of my mother, that I should enter the Army. At that time, as much as I could be anything, I was a Whig, and in favor of the Union. Candidates for our legislature included Colonel William Sneed, for whom my respect amounted almost to adoration; but I voted against him and in favor of John Baxter.

"I went through the war with its various conditions up to Appomattox. While under the direction of General Lee, I made peace, and have followed it ever since.

"When I returned to Knoxville, on my way home from the war, I was arrested twice between the depot and uptown for treason. I had been indicted by the Federal court for treason against the government, and also by the state government of Tennessee for treason against the state, because I had done exactly what the state told me to do. I had been directed by the state government to join the Confederate Army, but the state government in control when I got back from the Army was under Andrew Johnson's governorship, and held that the state had never been legally out of the Union, so I was indicted for treason against the state because I had obeyed the state's command. Judge E. T. Hall would not allow me to practise law while I was under indictment, holding that a felon was not admissible to the bar. The question was taken by John Baxter before Judge Triggs, United States judge, who held that no one was a felon until after a conviction, and ordered me sworn in as an attorney of his court in the old courthouse opposite the present building.

"I found it impossible to live in Knoxville, and, my mother having refugeed to the state of Alabama, I determined to go to that state. What little property I had was sequestered.

"In order to qualify myself to be a lawyer in Alabama, I appeared before the examining board of the court at Linden, Marengo county, composed of three judges, the chairman being Judge Cobb. It was a great day for the townspeople, who turned out to hear the examinations, which were oral. As the name of each applicant was called, he would rise in his place, and the three judges would take turns at plying him with questions as to the law—some of them being 'catch questions,' perhaps, but usually serious

(*concluded on page 866*)

*Photo by W. S. Ellis, Wilmington, Del.*

# *Hon. Josiah O. Wolcott*

## *U. S. Senator from Delaware*

THE recently chosen Senator from Delaware was born at Dover in that state on October 31, 1877. His father was a leading member of the bar and for a time held the office of chancellor.

Senator Wolcott received the degree of Ph. B. from Wesleyan University, Middletown, Connecticut, in 1901. He was admitted to the bar in 1904 and began practice at Wilmington, where he is now a member of the law firm of Marvel, Marvel, Wolcott, & Layton. He has been deputy attorney general and attorney general of Delaware, and was elected Senator at the last general election by a substantial plurality.

*Photo by The Paine Studio, Wash. D. C.*

# *Hon. Charles E. Townsend*

## *U. S. Senator from Michigan*

SENATOR Townsend's popularity with his constituents was demonstrated by his re-election to the office of Senator at the last general election by a plurality of 106,000. Previous to his promotion to the Senate in 1911 he had been for eight years a member of the House of Representatives.

He studied law and was admitted to the bar in 1895, and thereafter practised his profession at Jackson, in his native county. Prior to this he taught school for eight years, and in 1886 was elected register of deeds, and thereafter re-elected four times.

*Copyright by G. V. Buck, Wash. D. C.*

# *Hon. Henry F. Ashurst*

## *U. S. Senator from Arizona*

"LUMBERJACK, cowboy, clerk, and cashier in store, newspaper reporter, and lawyer," is the way Senator Ashurst's life story reads in the new Congressional Directory. He has climbed these steps to attain the senatorship of his state.

He was a member of the territorial legislature of Arizona, serving as speaker of the house and in the senate. He studied law and political economy in the University of Michigan; was twice chosen district attorney, and has practised his profession at Prescott.

Senator Ashurst was re-elected at the last election by a plurality of 8,612.

## *Col. William A. Henderson*

(*concluded from page* 862)

and directed toward bringing out the applicant's actual knowledge of the law. The examinations were, of course, frequently punctuated with great laughter, but there was little pause in the relentless questioning of the judges.

"When my turn came, Judge Cobb called my name. I arose with more or less trepidation. I was fairly confident, however, and was not taken off my feet by his first question, which was this:

"'Mr. Henderson, suppose I had a horse which you claimed to be yours, what procedure would you undertake to secure your rights?'

"Without hesitation, I stated that if I wanted the horse immediately, and could give a bond, I would bring an action of replevin, under which the sheriff would deliver the horse to me immediately and await the decision of the action. If I was not able to give a bond, I would bring an action of detinue, where the claimant would hold the property until judgment for delivery was pronounced in the case, when the sheriff would deliver the horse to me. If I had no particular desire to have the horse, I would bring an action of trespass, or trespass on the case, and seek a judgment for the value of the horse, as I would be able to prove it, and claim compensation in money. Then I paused a moment, and, bowing to the judge, added:

"'And, may it please your Honor, if anybody else had my horse, except yourself, I might institute a proceeding before the grand jury.'

"Judge Cobb bowed, and said:

"'Mr. Henderson, the court has no further questions to ask you—you may take your seat.'

"I thus became a practising lawyer of the state of Alabama."

Another incident related by Colonel Henderson related to his graduation from the University of Tennessee in 1856.

"I succeeded in making my way through the University of Tennessee, at the age of twenty, bearing a debt of some $800. At the commencement exercises that year there was a prize of $500 offered for the best oration, for which there were eleven contestants, I being one. The subject of my oration was, 'It Is the Heart, and Not the Head, That Rules the World.' The theme was that in all great movements there is very little sense involved, and a great deal of sentiment. I still believe I was right in my philosophy as expressed in the subject of my oration.

"A few minutes before the award was to be announced to an audience that packed the Second Presbyterian Church in Knoxville, I was notified that luck had been with me, and that I would be expected to make a few remarks. The Rev. James H. Martin was in charge of the exercises. Mr. Martin, from the platform, addressed me personally and at the conclusion of his remarks he handed me the vellum, sealed with ribbon, in testimony of the decision, and bowed, preparing to step back on the platform. I raised my hand to Mr. Martin, in order to be assisted to the platform, so as to come into view. Instead of giving me that assistance, he bowed smilingly, and said:

"'Young man, the money will be handed to you to-morrow.'

"I slunk back to my seat amid the greatest humiliation of my life, without saying a word; but I vowed right then and there that I should never again allow myself to be caught in a position where I should have nothing to say back."

Younger heads, on stronger shoulders, have relieved the venerable counselor of most of the burdens of the railroad's litigation; but in the conferences that take place from time to time in the management of the company's legal affairs, flashes of that same "mother wit" that gained Colonel Henderson admission to the bar of the state of Alabama throw new light on the complicated questions that present themselves for solution, and his suavity of manner begets good feeling among all with whom he comes in contact.

# QUAINT and CURIOUS

So runs the world away.—Shakespeare.

**New Form of Insurance.** A form of insurance that is likely to prove popular in America has appeared in Vienna. It is that of insuring a girl against being an old maid. The new form of insurance grew out of the probability that there would be a great shortage of men following the war and a consequent certainty that there would not be enough men to go around.

This insurance is just as business like and efficient in its arrangement as is life insurance. Instead of passing upon the applicant's health, the agent bases her acceptability as a risk upon her degree of beauty, personal charm, and wifely qualities. The prettiest girls are the best risks, the homely ones having to pay the highest premiums.

The Kansas City Times suggests one difficulty about the arrangements. Who is to fix the age at which the insurance becomes payable? To claim the insurance would be tantamount to an admission on the woman's part that there is no hope of her winning a husband. And a great philosopher has said that a woman resigns the idea of getting married only with life itself. And another equally great philosopher has remarked that hope springs eternal in the feminine breast. So it would seem the insurance company has got all the better of the arrangement.

**Sick Beans.** Now come government experts with a discovery which will prove a shock to Boston when it learns that its lowly but cherished bean is subject to a disease, exclusive, but deadly.

The discovery was announced in the court of Judge K. M. Landis by government chemists who were testifying concerning 14,400 cans of pork and beans which had been condemned as unfit for use.

"What's the matter with 'em?" asked Judge Landis as he sniffed at a can that had been opened.

"Anthracnose," replied the expert who was on the stand. "It makes them unfit for food. One bean with anthracnose can soon give it to a million. It's just been discovered."

"What's it like?" asked the court.

"Well," rattled off the expert, "it's caused by several species of melanconfaceous fungi which have neither asci nor pycnidia—"

"That's enough," interrupted Judge Landis. "We can't tolerate sick beans, specially if they haven't any pycnidias. Dump 'em in the lake."

**John Adams and His Books.** After graduation from Harvard College, in 1755, John Adams had the choice of three things. He could be a clergyman, a doctor, or a lawyer. While thinking this serious problem over he taught school for a while in Worcester. It is fortunate for most of the Christian graces that he turned from the ministry, for he never could have run in that harness. Beginning the study of law, in 1756, in two years he believed himself ready to convert theory into practice. Jeremiah Gridley, then leader of the Boston bar, showed himself friendly and presented Adams to the court with a recommendation for the oath. This administered, the legal neophyte invited the rest of the bar "over to Stone's to

drink some punch." "No lawyer," he later wrote, "ever did so much business as I did afterwards, in the seventeen years that I passed in the practice of the bar, for so little profit."

In those days there were no general collections of law books available to all who practised, and each lawyer must have been obliged to surround himself with the formidable tomes necessary to the practice of his profession. In the John Adams collection are many of these heavy, forbidding volumes, and a good share of them carry the autographs of Jeremiah Gridley. Probably he bought them before or after Gridley's death, and a sturdy lot they are: d'Aguesseau, Baron Fortescue, Barnardiston, Daines Barrington, Sir James Burrow, Bynkershoek, Coke, Cowell, Cujacius, Heineccius, Holt, Grotius, Lutwyche, Plowden, Puffendorf, Rushworth, Salkeld, Saunders, Selden, Siderfin, Skinner—these are but some of the names famous in the legal world of the seventeenth and eighteenth centuries, and some acquaintance with them was needful to him who would rank high even in a provincial town. But as they stand in solemn, unillumined rows, they seem uncommonly dead and out of touch with anything that concerns us to-day, yet by no means without some sentimental interest. A book like Sir Matthew Hale's "History of the Pleas of the Crown," bearing the autographs of and used by John, John Quincy, George Washington and Charles Francis Adams (the elder) speaks of the continuity of tradition in one great American family.—Lindsay Swift in Boston Transcript.

**Practice at the Criminal Bar.** There went to his account the other day Mr. Edmund D. Purcell, a well-known barrister, who practised years ago like Gilbert's judge, "at the Sessions and the Ancient Bailey," and died, moreover, just after he had published a book called "Forty years at the Criminal Bar." Mr. Purcell soon makes it clear that if the chancery bar retains the flavor of Dickens's Mr. Phunky, Q. C., you have to go to the Old Bailey to meet Serjeant Buzfuz in the life, and there were more types of him a generation ago than there are now. You can at most imagine even the prisoner arising in these days and citing the rough and ready tribunal of public opinion to condemn judges and magistrates of the old Draconic order like Sir Peter Edlin, who always seemed to regard an acquittal as "a personal insult." Those were days, he adds, when sentences were savage and indiscriminate, but even this evil brought its antidote in the end, for vindictive or remorseless judges like Lord Brampton and the other "hanging judges" tended to make juries reluctant to convict a prisoner, however complete was the evidence against him.

As a rule, the criminals in whom Mr. Purcell interests us are not so much monsters of depravity as gentry endowed with a certain ingenuity that interests if it fails to edify. We read of a registrar convicted of inventing any number of infants and planting them down (on paper) at the houses of aged couples and unblemished spinsters, all for the sake of drawing fees per head; and he was not exposed until false vaccination certificates revealed the signatures as forgeries of his far too clever pen. We read of a house being stolen, literally stolen, having been removed piecemeal; and of burglaries which were the work of a limited company, for the group of systematic burglars who executed them with the completest modern scientific outfit could hardly be considered by any other term. Lastly, we read of a builder who boasted an almost miraculous well which saved him water dues in connection with the running of his business; and one uses the term "running" advisedly, for the shrewdness of a company's inspector showed that by cutting off a certain unaccountable pipe of theirs, the mysterious well ran dry, and the builder had been swindling the water company for years before the fraud was laid bare.—J. P. Collins in Boston Transcript.


"The most completely lost of all days is that on which one has not laughed."—Chamfort.

**A Judge and an Egg.** Judges on the bench have been assaulted. A litigant once threw an egg at the late Vice Chancellor Malins in an English court. The judge had the presence of mind to duck his head, and at the same time he established a reputation as a humorist by remarking that the present must have been intended for his brother, Bacon, the Vice Chancellor, who was sitting in an adjoining court.—London Spectator.

**Strategy.** Ryan (with newspaper)—It took six policemen to get wan foightin Oirishman out of the saloon.

Shea—Huh! Shure, wan of thim might hove done it dead aisy.

Ryan (warmly)—Indade! An' how?

Shea—Pwhy, be standin' outside the dure an' callin' the Oirishman a loiar.—Boston Transcript.

**No Objection.** When Governor Head was in office in New Hampshire, Colonel Barrett, of the governor's staff, died, and there was an unseemly scramble for the office, even while his body was awaiting burial with military honors. One candidate ventured to call upon Governor Head.

"Governor," he asked, "do you think you would have any objections if I were to get into Colonel Barrett's place?"

The answer came promptly. "No, I don't think I should have any objections, if the undertaker is willing."

**It Wouldn't Do.** The leading lawyer of a great company introduced the president of the road to a well-known clergyman.

"Doctor," said the lawyer jocosely after the introduction, "I thought it might be possible for you to give Mr. ———— a pass to heaven."

"Oh, no," was the instant reply, of the minister. "That wouldn't do, you know. It would be a shame to separate him from his counsel!"

**Encumbered.** "Ever tempted to sell your automobile?" asked the Cheerful Idiot.

"The temptation is strong enough," replied Mr. Inbadd, "but there are too many points involved. You know I mortgaged my house in order to buy the machine."

"Yes, I knew that."

"Well, I mortgaged the machine in order to build the garage, and now I've had to mortgage the garage in order to buy gasolene."—Puck.

**Fiction Better than Truth.** A certain politician seeking office was very much incensed at certain remarks which had been made about him by the leading paper of the town. He burst into the editorial room like a dynamite bomb and exclaimed: "You are telling lies about me in your paper and you know it!" "You have no cause for complaint," said the editor coolly. "What in the world would you do if we told the truth about you."—New York Globe.

**They Dissented.** "Do you have any differences of opinion in your family?" "Terrible. Why, it couldn't be any worse if we were all members of the Supreme Court."—Life.

**He Could Hear That.** A Chinaman was brought before a magistrate in a court of a Canadian city and received a fine for a slight misdemeanor. The judge had great difficulty in making the

Oriental understand, for he pretended not to know a word of English.

"Look here, man," he said disgustedly, "that is $1. Do you see? Pay it—otherwise in jail! Understand?" The Chinaman signified that he did not understand and the magistrate repeated it.

"Let me talk with him, your honor," said the portly officer who had arrested the man. "I'll make him understand!"

When the judge had given him leave the officer approached the Chinaman and shouted in his ear:

"Say, you with the teakettle face, can't you hear anything? You've got to pay $2 fine!

"You liar!" cried the Chinaman, "It's only $1."—Youth's Companion.

**His Business.** "You insist that the officer arrested you while you were quietly attending to your own business?"

"Yes, your Honor. He caught me suddenly by the collar, and threatened to strike me with his club unless I accompanied him to the station house."

"You say you were quietly attending to your own business, making no noise or commotion of any kind?"

"Yes, your Honor."

"What is your buiness?"

"I'm a burglar."—Lippincott's.

**Some Pretty Long Tramps.** The north country policeman is usually not without humor of a kind, although perhaps his answers are occasionally unconsciously amusing. An English tourist was doing the Scottish Highlands, and, forgathering with the village policeman in and out-of-the-way place, he said: "I suppose you have some pretty long tramps in this district, my man?" "Weel, I'm thinking," replied the worthy keeper of the peace, as he surveyed the lengthy stranger with somewhat sarcastic eyes, "You're the longest I've seen yet." —Argonaut.

**Sensibility.** Two highly respectable citizens of Brooklyn were strolling past the old King's County Penitentiary, now nothing but a memory. They noticed a gang of convicts working on the road, and paused to watch the prisoners, who appeared harder than the stones they were breaking. The guard, a tough-looking man, came along and said:

"Beg pardon, gentlemen. You will have to move on. It embarrasses the boys to have their *friends* see them in such a predicament."—Evening Post.

**Subdued.** During the impaneling of a jury in Philadelphia the following colloquy ensued between the judge and a talesman:

"You are a property holder?"

"Yes, sir."

"Married or single?"

"Married three years last March."

"Have you formed or expressed any opinion?"

"Not for three years, your Honor."—New York Times.

**Had Seen Wuss.** A deaf man was being married, and the parson asked the usual question, "Do you take this woman for your lawful wife?" "Eh?" said the deaf man. "Do you take this woman for your lawful wife?" This time a bit louder. The groom seemed to get angry. "Oh, I don't know," he said. "She ain't so awful. I've seen wuss than her that didn't have as much money.—N. Y. Globe.

**Too Apt Quotation.** The attorney for the gas company was making a popular address.

"Think of the good the gas company has done!" he cried. "If I were permitted a pun, I would say, in the words of the immortal poet, 'Honor the Light Brigade.'"

Voice of a consumer from the audience: "Oh, what a charge they made!" —Youth's Companion.

**In the Right Place.** An Englishman, at a dinner in New York, hailed with delight the conviction by the courts of an American who had stolen millions by means of bogus mines.

"But a friend of the criminal heaved a sigh and said:

"'Poor old Charlie! His heart's in the right place, anyway.'

"'Yes,' said the Englishman, 'and so, thank heaven, is the rest of him for the next four years.'"